DAMAGE BOOK

UNIVERSAL
LIBRARY

A TREATISE

ON

THE NATURE AND SCOPE

OF THE

SCIENCE OF LAW

BY

SYED KARAMAT HUSEIN

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW, ADVOCATE, HIGH COURT OF JUDICATURE, N.-W. PROVINCES, INDIA, FELLOW AND MEMBER OF THE FACULTY OF LAW OF THE UNIVERSITY OF ALLAHABAD.

Allahabad:

PRINTED AT THE CITY PRESS,

1902.

PREFACE.

A monograph "on the Nature and Scope of the Science of Law," after the valuable works of Austin, Dr. Holland, Dr. Markby and Sheldon Amos on Jurisprudence may seem to many of the readers of this book an unnecessary reiteration. The point of view from which the subject has been approached in this work is, however, different from the one taken by the authors above named. It is, therefore, earnestly hoped that those who may take the trouble to read this book will please suspend their judgment till they will have gone through it.

I am greatly indebted to my friend Mr. M. A. N. Hydari, Fellow of the University of Bombay, who very kindly went through the manuscript of this work, and improved it in many ways, both in matter and in form. He also very kindly corrected the proof sheets.

S. KARAMAT HUSEIN.

ALLAHABAD:

22*nd October* 1902.

TABLE OF CONTENTS.

PART I.

INTRODUCTORY.

1. Those who have studied the valuable works of Austin and Dr. Holland on Jurisprudence must be familiar with the subject matters of those works. They must also be familiar with the fact that Jurisprudence has been defined by Dr. Holland to be the 'Formal Science of Positive Law.'

The above conception of Jurisprudence, considered along with the matters dealt with in the above works on Jurisprudence, naturally leads one to infer that the expression the 'Formal Science of Positive Law' stands for a well-defined and clear conception, and that its sphere is co-extensive with, or at least includes, all those subject matters which are dealt with in the works of Austin and Dr. Holland on Jurisprudence.

2. The following pages aim at examining the legitimacy of the above inference, with special reference to the exact meanings to be assigned to the terms Science, Art and Law and to the phrase 'the Science of Law.' As a preparatory step, a definite conception of the following terms, as employed in these pages, is indispensable :—

(*a*) Proposition.

(*b*) Scientific knowledge.

(*c*) Science.

(*d*) Art.

(*e*) Law.

(*f*) Principle.

(*g*) Abstract.

(*h*) General.

Vagueness in conception of the terms employed is utterly foreign to the Scientific method. When our conception of the terms we employ is inexact, the propositions into the formation of which the inexact terms enter, express wrong judgments. In other words the relations of existence, co-existence or sequence stated in those propositions may or may not correspond with the objective relations in which those terms really stand. Such want of correspondence or truth in the propositions naturally leads to a want of correctness in the conclusions we draw.

The unsatisfactory results which flow from the employment of vague terms in ratiocination are analogous to the bad results which follow when a chemist mixes wrong quantities of ingredients to produce a compound. To ratiocinate with inexact terms is to make chemical compounds with unfixed quantities of elements, or to measure space with an indeterminate *foot*.

3. Those who have read any book on Logic will have a clear and distinct idea of the meaning of the term 'proposition,' and it is used in these pages in its logical sense alone. Simply to refresh the memory of the reader, we quote the following extracts showing what a 'Proposition' means :—

"The meaning of the proposition, therefore, is, that the individualthing denoted by the subject, has the attributes connoted by the predicate." (Mill System of Logic, Chap. V, Sec. 4, Vol. I, p. 108, 5th ed.)

"Judgment expressed in words is a proposition." (The Elements of Logic :—Bernard Bosanquet, p. 80.)

"Existence, co-existence, sequence, resemblance; one or other of these is asserted (or denied) in every proposition which is not merely verbal, This five fold division is an exhaustive classification of matters-of-fact, of all things that

can be believed, or tendered for belief; of all the questions that can be propounded, and all answers that can be returned to them. Instead of co-existence and sequence, we shall sometimes say, for greater particularity, Order in Place and Order in Time; Order in Place being the specific mode of co-existence, not necessary to be more particularly analysed here, while the mere fact of co-existence, or simultaneousness, may be classed together with sequence, under the head of Order in Time." (Mill. System of Logic, Vol. I, Chap. V, Sec. 6, p. 115, 5th ed.)

4. No definite and clear conception of 'Scientific Knowledge' is directly needful for the purposes of this work; but as a definite and clear conception of the term 'Scientific' is essential for our purposes, and as there exists a close connection between the term 'Science' and the expression 'Scientific Knowledge' an extract from Herbert Spencer, which in a masterly manner explains the nature and characteristics of scientific knowledge, is given in App. (1).

5. The extract given in App. (1) contains the following important propositions regarding the nature and characteristics of 'Scientific Knowledge':—

(*a*) Common knowledge and scientific knowledge do not differ inkind, but only in degree.

(*b*) The points of identity in nature between common knowledge and scientific knowledge are that:—

i—The mental faculties employed in the acquisition of both are the same,

ii—The mode of the working of the faculties, employed in both cases, is fundamentally the same.

iii—The object of both orders of knowledge is the same, *viz.*, *prevision.*

(c) The points of difference between common knowledge and scientific knowledge are that :—

i—Common knowledge deals with simple and directly *perceived* relations among the phenomena in Nature.

ii—Scientific knowledge deals with such relations as are complex, indirect and remote from *perception.*

iii—The process by which *prevision* is acquired in common knowledge is simple, while the process employed in scientific knowledge is complex.

iv—In a highly developed scientific knowledge the *prevision* is quantitatively exact, which is possible when the phenomena dealt with are measurable.

v—Quantitative *prevision* can only be reached deductively while induction establishes qualitative *prevision.*

6. Having set forth the characteristics of 'Scientific Knowledge,' a scientific pro position may be defined as *a proposition which expresses some scientific knowledge.* By way of illustration

we give here in a note a few examples of the propositions of common knowledge and of scientific knowledge.

Common Knowledge.	Scientific Knowledge.
Apples fall from the tree to the ground.	1. All bodies in nature exert a mutual attraction upon each other in virtue of which they are continually tending towards each other. 2. For the same distance the attraction between bodies is proportional to their masses. 3. The masses being equal the attraction varies with the distance, being inversely proportional to the square of the distances.
C. K.	S. K.
All bodies fall in vacuum.	1. In vacuum all bodies fall with equal rapidity. 2. The space which a falling body traverses is proportional to the square of the time during which it has fallen. 3. The velocity acquired by a falling body is proportional to the duration of its fall.
C. K.	S. K.
Water is a compound.	Water is made up of 2 volumes of hydrogen for every volume of oxygen, or of 2 parts of hydrogen to 16 parts of oxygen by weight.
C. K.	S. K.
Red oxide of mercury is a compound of oxygen and mercury.	108 ounces of red oxide of mercury is always made up of 100 ounces of metallic mercury and 8 ounces by weight of oxygens.
C. K.	S. K.
Lime is a compound of calcium.	56 parts by weight of lime are made up of 16 parts by weight of oxygen and 40 parts by weight of calcium.
C. K.	S. K.
Heat melts silver.	Silver melts at 1000.

7. The exposition of the nature and characteristics of scientific knowledge in general terms coupled with the particular examples of scientific knowledge, which have been given in the note, will, let us hope, be sufficient to give our readers a

---

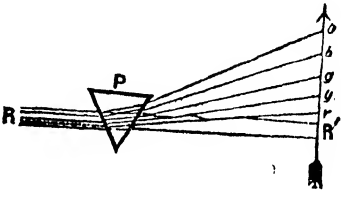
C. K.

When a pencil of solar light passes through a prism *dispersion* takes place.

S. K.

Radiant energy is made up of many different vibrations, some are comparatively long and are slow in their vibration, others are very short and much more rapid. The short quickly-vibrating waves are most bent from their straight path by passing into a different medium, and are therefore said to be most refrangible. It is evident that if a beam of radiant energy, in which each ray corresponds to a definite wave-length, travelling straight on, enters a denser medium, the separate rays will be spread out like the ribs of a fan, those of the shortest waves being most turned from the straight line, those of the longest waves least.

62.—The spectrum. When the undulations which come from an intensely vibrating solid enter a triangular glass prism (Fig 7. P), through a narrow slit, they are spread out by refraction and arranged side by side in perfect order from those of shortest wave-length, *v*, to



those of longest, *r*, forming a *spectrum*. The waves shorter than $\frac{1}{67000}$ of an inch have a peculiar power of affecting certain substance and producing chemical changes, but they

clear and exact conception of what scientific knowledge means, and will, no doubt, enable them to frame a definition of 'Science' for themselves. In order, however, to help them further in obtaining a definite and clear conception of the term 'Science', we may state that the word 'Science' denotes a complex conception. Analytically speaking, it consists of several elements. In the first place, it is a collection of *propositions* as distinct

---

have no effect on the senses. The waves between $\frac{1}{67000}$ and $\frac{1}{28000}$ of an inch in length (*v r*) affect the sense of sight through the eye, producing sensations of light and colour, hence they are termed light-waves. Waves of longer wave-length set the particles of bodies in vibration when they fall on them ; they are invisible to the eye and are known as heat-waves. The shortest of the light waves (*v*) produce the effect of violet light, longer ones (*b*) blue, still longer (*g*) green, longer yet (*y*) yellow, and the longest that produce any effect on the eye (*r*) red. Thus when one looks at a glowing solid body through a spectroscope, an instrument containing one or more prisms, the colours red, yellow, green, blue, violet are seen ranged in a row as in the rainbow (Fig 8 which gives a detailed view of the range *v r* in Fig 7), but the eye sees nothing of the short waves-length rays beyond the violet, nor of the relatively long wave-length rays beyond the red. Still longer waves can be detected by their electro-magnetic action. In fact, all radiation is essentially electro-magnetic. (The Realm of Nature by H. R. Mill, pp. 37, 38.)

C. K.

Things have different colours.

S. K.

The light which is produced when waves of radiant energy corresponding to all or nearly all the wave-lengths that affect vision strike the eye together, is white. When

from *ideas*. Secondly, these *propositions* have all the characteristics of scientific knowledge Thirdly, two or three scientific *propositions* do not suffice to make up a Science. There is a colligation of a larger number of such *propositions*. Fourthly, the grouping of the scientific *propositions* is not a promiscuous colligation, but is done with special reference either to:—

a) A class of phenomena in Nature; or,

---

waves of light fall upon any object, someare absorbed and others are reflected ; the report these reflected rays convey through the optic nerve to the brain names the colour of the object. Thus when sunlight falls on grass the rays whose vibrations produce the effect of red, yellow, blue, and violet are almost all absorbed, their energy being set to do work in the plant (s. 399),and only those which produce the sensation of green are sent back to the eye. Similarly when light falls on a sliced beet-root the yellow, green, blue, and violet producing vibrations are absorbed and only the red-producing rays sent back. When light falls on a piece of charcoal it is all absorbed, and as none is reflected the body appears devoid of light or black. A sheet of paper, on the other hand, absorbs very little of the light and reflects white light as white. The fact that colour comes from the light, not from the object, may be illustrated by sprinkling salt on the wick of a burning spirit-lamp. The sodium of the salt gives out light of one wave-length only, producing the sensation of yellow. In this light objects which reflect all kinds of light and those that reflect yellow appear yellow, but such things as beet-root and grass absorb all the yellow light and appear black, like charcoal, which absorbs all light whatever, and the most brilliant painting appears in tones of black and yellow only. (The Realm of Nature by H. R, Mill, p. 39.)

(*b*) A particular end to be achieved by a particular Art.

Thermatics (the Science of Heat) is an example of the first. That Science deals with the phenomena manifested by the form of energy called heat. It analyses those phenomena and states the laws of their co-existence, sequence, or dependence. Dynamics, Acoustics, Optics and Astronomy belong to the same *species* of Science. Each of them deals with a definite class of phenomena in Nature, and reduces the uniformity of the relations of co-existence or sequence among those phenomena to the form of scientific propositions.

Again, the collection of scientific propositions may have reference not to a class of phenomena in Nature, but to a definite end to be achieved by an Art. Architectonics, Medicine and Ethics are examples of this *species* of Science. Each of them is a collection of such scientific propositions as form the basis of a corresponding Art.

The end of the Art of Healing, for example, is to cure diseases. For the attainment of the said end that Art orders patients to perform certain voluntary acts, which assume the form of taking certain drugs, using certain diet and avoiding certain acts. The rules of conduct involving the above named acts and abstinences, if rightly framed, are based on the uniformity of the relation of co-existence or sequence between the use of the drugs or of the articles of food and the acts or abstinences on the one hand, and health or disease on the other. The uniformity of connection between health and the lines of conduct prescribed by the Art of Healing is discovered by observation and experiment, and is expressed in the shape of scientific propositions, which furnish a ground work for the rules of the Art of Healing, and which are collectively designated the Science of Medicine. Science may therefore be defined as a *collection of scientific propositions made with reference either to a particular class of phenomena in Nature, or to a definite end to be achieved by an Art.*

8. We have intentionally omitted the phrase 'systematically arranged' from the definition of 'Science.' Our reason for so doing is that a systematical arrangement of the subject matters treated of in a Science forms no essential element of that Science; be it a Science which furnishes a ground work for the rules of an Art, or a Science which formulates the laws of a particular class of phenomena in Nature.

Herbert Spencer in an essay on 'the Genesis of Science' has conclusively shown that there can be no serial arrangement of the various sciences, and the reasons given by him for the above proposition apply with equal force to the proposition of *one* Science.

We have quoted from Herbert Spencer (see App. 2) such passages as show the absence of seriality among the various sciences, and proceed to apply his reasons to establish the absence of seriality among the proposition of *one* Science.

9. The substance of the extracts given in App. (2), so far as is necessary for our purposes, may be set forth as follows:—

(*a*) We have no warrant for assuming that there is some order in which the sciences can be placed.

(*b*) The notion of a succession or a lineal arrangement owes its origin to a wrong inference from one of the laws of the human mind.

(*c*) That law is, that man is obliged to think in sequence.

(*d*) Men, in consequence of the above law, have fallen into the belief that Nature is serial, and that, therefore, the sciences must be classifiable in an order.

(*e*) The German view that Nature is 'petrified intelligence,' and that logical forms are the foundation

of all things lends support to seriality in Nature; but it is not likely that Nature has consulted the minds of scientific men for arranging its phenomena.

(*f*) Sciences are the product of a psychological process, historically displayed, showing the simultaneous advance in generalization and specialization, and the increasing sub-division and re-union of the sciences.

(*g*) The mental process by which classification is effected is a recognition of the likeness or unlikeness of things, in respect of their size, colour, form, weight, texture, taste, &c., or in respect of their mode of action.

(*h*) The same process underlies naming and therefore language.

(*i*) The same process underlies reasoning; so that as classification is a grouping together of like things, reasoning is a grouping together of like relations among things.

(*j*) The same mental process gives birth to the notion of equality of things and equality of relations, whereby a foundation is laid for the production of Science.

(*k*) Out of the notions of equality and number, the elements of quantitative *prevision* arise.

(*l*) The above process shows that sciences have not separately evolved.

10. The arguments set forth in the preceding section apply to any particular arrangement of a body of scientific truths in which they may be exhibited in a book on *one* Science. All the scientific propositions collected in one book, in the first

place, are not necessarily the product of one mind, and therefore we have no warrant for stating that the order in which the scientific propositions have been arranged corresponds with the order in which they were formulated by different minds. Granting, secondly, that the collection of the scientific propositions, arranged in a definite order in a particular book, is the product of one mind, there is nothing to show that they have been arranged in the order in which they were thought out and formulated. Thirdly, the scientific propositions, arranged in a particular manner, disclose the relation of co-existence or sequence among a particular class of phenomena in Nature, and it is preposterous to hold that those phenomena were manifested in Nature, in the order in which they have been expounded in the book. Fourthly, it will be admitted, on all hands, that one *arranger* observes certain likeness and unlikeness among a number of scientific propositions and arranges them accordingly. Another *arranger* is quite free to observe some other likeness and unlikeness in such propositions and to arrange them differently. Such being the case, an arrangement is the result of the working of a particular mind, and is entirely foreign to the scientific propositions which are arranged.

Again, if we call to mind the broad distinction between Science and Art, which is that the former gives some information and that the latter requires some action, we shall at once see that an arrangement or *classification,* which is concerned with *doing* some thing, cannot possibly be placed under the *genus* of Science. Correctly speaking, it is an Art, and such being the case, the position that a systematical arrangement is an integral part of any Science is not tenable.

11. The reasons set forth in the preceding sections, let us hope, are conclusive to show that an arrangement forms no part of any Science. If, however, we contemplate the order in which the phenomena in Nature are noticed by man and the laws of their dependence formulated by him in the form of

propositions, the notion of an artificial arrangement among the propositions of one Science turns out to be a sheer impossibility. The extract from Herbert Spencer given in App. (3) explains the order in which phenomena are observed and the laws of their dependence formulated.

The order in which they are observed and their interdependence generalized is:—

(*a*) Directness with which the personal welfare of the observer is affected by the phenomena.

(*b*) Conspicuousness of the phenomena.

(*c*) Frequency, absolute and relative, of the phenomena.

(*d*) Simplicity of the phenomena.

(*e*) Degree of abstractness.

12. Some of the readers of these pages may think that the truth, that a systematical arrangement of its propositions is no essential element of a Science, is self-evident, and that the labour bestowed upon establishing it has been wasted. Such however is not the case, for one often comes across such definitions of 'Science' as make a systematical arrangement of its propositions an integral part thereof. The following are some of such definitions:—

"Accumulated and established knowledge, which has been systematised and formulated with reference to the discovery of general truths or the operation of general laws; knowledge classified, and made available in work, life, or the search of truth; comprehensive, profound or philosophical knowledge." Science, Webster's Dictionary.

"With regard to a science, it has been remarked that the word has been used in many senses, from 'knowledge arranged and methodical' to 'certainty based on demonstration.' (Guy Journal of Statistical Society, 1865). For example, the following definitions have been given by eminent scientific men and mental philosophers:—

'Science is the knowledge of many, orderly and methodically digested and arranged so as to become attainable by one.' (Sir John Herschel, Outlines of Nat. Phil., p. 18).

'Science is the consideration of all subjects, whether of a pure or mixed nature capable of being reduced to a measurement and calculation.' (Sedgwick, Address to the British, Association.)

'A science is a complement of cognition, having in point of form the character of logical perfection and in point of matter, the character of real truth.' (Sir W. Hamilton, Lec. on Logic ii, 2.)

The late Professor Wall said that Science might be roughly defined, as 'any methodical system which traces an idea or law through the greatest possible variety of phenomena for the purposes of knowledge.' (MS. Note of lecture taken in 1863). Whilst art might be defined as 'any system which brings together multiplicity of knowledge for one effect.'

N B.– Science is not derived from, nor is it controllable by, the human will and is objective.

Art is derived from and controllable by, the human will, and is subjective. (Abridgment of Adam Smith's Wealth of Nations by Emerton, p. 864).

Some of the definitions of 'Science' quoted above, it would seem, have been framed after examining such books on Science as treat of their subject matter in a systematical order. The examination of such books has, by the operation of the law of association, led the framers of such definitions to think that a systematical exposition is an integral part of scientific knowledge.

Rightly understood, a systematical arrangement of the propositions of a Science, dealing as it does with *doing* some thing, is an Art which has for its basis the laws of the working of the human mind.

Not only the propositions of a Science, but the flora and fauna of the earth, and the furniture in a house, admit of a systematical arrangement. This fact alone is sufficient to place it beyond doubt that a systematical arrangement of the propositions of a Science is not an essential element of that Science; nor can such an arrangement find a place under the *genus* of 'Science.' Nature has not consulted the convenience of book-making and the orderly arrangement of the laws of a particular class of phenomena in a book does not correspond with her exhibition of such phenomena.

From what we have stated regarding the nature of a systematical arrangement it must not be inferred that we consider such an arrangement a worthless artifice. Nothing can be farther from our mind than such a notion. A systematical arrangement is of very great utility in many ways, and we fully appreciate its real value. It materially facilitates the organisation of the knowledge, conduces to obtain a definite conception of the points of likeness and unlikeness among the individuals placed under the classes and sub-classes, helps the memory, and promotes the progress from common knowledge towards scientific knowledge. What we feel anxious to impress upon the minds of the readers of these pages is that :—

(*a*) A systematical arrangement of the propositions of a Science forms no integral part of that Science.

(*b*) A systematical arrangement does not belong to the *genus* of Science.

(*c*) A systematical arrangement is an Art.

13. The sections dealing with the definition of 'Science' show that :—

(*a*) When the term 'Science' is employed as a correlative to 'Common Knowledge' it denotes a higher phase of knowledge, the distinctive features of which are :—

i—A remoteness from *perception* of the phenomena dealt with.

ii—A quantitative exactness of the *prevision* when the phenomena are measurable.

(*b*) When the term 'Science' is used as a correlative to the term 'Art' it denotes a collection of scientific propositions which furnishes a basis for the rules of that particular Art.

(c) When the term 'Science' is used with reference to a particular class of phenomena in Nature, and in correlation to an ordinary knowledge of such phenomena, as in the phrases 'the Science of Heat' or 'the Science of Light,' it means a collection of scientific propositions which lay down the laws of co-existence or sequence among those phenomena. Metaphorically speaking a Science dealing with a particular class of phenomena in Nature, consists of a particular *race* of scientific propositions; whilst a Science correlative to an Art, consists of an *army* of Scientific propositions recruited from various *races*. One cardinal point regarding 'Science' must never be lost sight of. No matter in which of the three senses above noted the term is employed it simply gives *information* regarding a relation among phenomena, and serves as a guide to conduct.

14. Having defined Science, and set forth the three senses in which that term is employed, the next term we have to define is 'Art.'

We find in the New English Dictionary of Murray, the following among the meanings of the term 'Art': –

8. A practical application of any Science; a body or system of rules serving to facilitate the carrying out of certain principles. In this sense often contrasted with Science. 1489 CAXTON *Faytes of Armes* 1. i. 2. Emonge thother noble artes and sciences. c. 1538 STARKEY *England* 11 i. 160. Scholes in euery Arte, syence and craft. 1588 FRAUNCE, *Lamiers Log*, 1. i. 6. An art is a methodical disposition of true and coherent preceptes, for the more easie perceiving and better remembering the same. 1599 SHAKS. *Hen.* v. 1. i. 51. So that the arte and Practique part of Life must be the mistresse to this Theorique. 1724 WATTS *Logic*, 11. ii. c. 9. This is the most remarkable distinction between an Art and a Science, *viz.*, the one refers chiefly to practice, the other to speculation. 1825 BENTHAM *Ration. Reward*, 204. Correspondent.....to every Art, there is at least one branch of Science; correspondent to every branch of science, there is at least one branch of art. 1852 M. CULLOCH *Dict. Comm.* 449. Agriculture

is little known as a Science in any part of America, and, but imperfectly understood as an Art. 1870, Jevons *Elem. Logic*, i. 7. A Science teaches us to know and an Art to do). The New English Dictionary, an Historical Principles by Murray, Vol. I, Arts.)

Other extracts given in App. (4) well specify the nature of 'Art' and the characteristics which distinguish it from 'Science.'

15. The extracts given in the appendices regarding the connotations of the terms Science and Art establish that :—

(a) A Science* is a collection of propositions, which express scientific knowledge, regarding existence, co-existence, sequence or resemblance among phenomena.

---

*Sir Frederick Pollock has written an Essay on 'the Science of Case Law' and in that Essay we find the following passages :—

"The state of English case law as a whole might be not unfairly described as chaos tempered by Fisher's Digest. Hence it is assumed by a not unnatural fallacy that there must have been something bungling and unscientific in the operation by which the results themselves were produced. What we now seek is to show that these operations have a truly scientific character, and that English case law may fairly claim kinred with the inductive sciences.

"The ultimate object of natural Science is to predict events—to say with approximate accuracy what will happen under given conditions. Every special department of Science occupies itself with predicting events of a particular kind. Note also that each Science occupies itself only with those conditions which are material for its own purposes. The object of legal Science, as we here understand it, is likewise to predict events. The particular kind of events it seeks to predict are the decisions of courts of justice. Like the other sciences, it selects its own set of conditions to deal with. Let us consider for a moment an event which has both physical and legal consequences. If A strikes B, then the effect of the blow on B's equilibrium is a matter of mechanics; the effect on his organism is a matter of physiology; the effect giving him a right of action is a matter of law. For the scientific examination of the events in each of these several aspects we want to know and to deal with the several appropriate sets of conditions and those only; thus if B struck A first this is irrelevant to the mechanical question, but relevant to the legal question. The legal result is as definite and capable of prediction as either of the mechanical or the physiological one; the needful thing in each case is that the right set of

(*b*) An Art is a collection of the rules of conduct for the attainment of an end.

(*c*) A Science has reference to *knowing*; an Art to *doing*.

(*d*) Science gives information; Art requires action.

(*e*) The information furnished by Science serves to guide conduct.

---

conditions be rightly observed. So far, then, natural Science and legal Science aim at like objects. Let us go on to consider the likeness of means by which those objects are accomplished.

"In natural Science we need an all-embracing fundamental assumption before we can take any step towards prediction; in other words, before we can have any Science at all. This assumption is that nature is uniform. We act on the belief that whenever the same conditions are repeated they will give the same result, and we refuse to entertain any supposition to the contrary. How we came by this axiom of the uniformity of nature or whether it can be justified, otherwise than by its results, we have not now to ask: all we need remark is its place as the corner-stone of Science. It is plain that without it we could make no use of past experience.

"Turning now to legal Science we find that an assumption of the same kind is no less needed. In order to predict physical results, we must suppose that the same thing always happens under the same conditions; and in the same way, in order to predict legal results, we must suppose that the same decision is always given on the same facts. We must have a fundamental axiom of the uniformity of law corresponding to the fundamental axiom of the uniformity of nature." (Essays in Jurisprudence and Ethics, pp. 238-39).

"We have now seen that case-law has a scientific aim, namely, the prediction of events by means of past experience, and that the possibility of such prediction rests, as in other sciences, on a fundamental assumption of uniformity. We have seen also that in the Science of Law, this assumption is a conventional one—that is to say, one which it is in our own power to make approximately true, and how that purpose is served by some of the most characteristic parts of our legal system. Let us now continue the parallel between the method of case-law and scientific method in general." (Essays in Jurisprudence and Ethics, p. 216.)

The utmost that the passages, already quoted, can establish is that by impressing the phenomena of case-law with the stamp of a conventional uniformity, namely, that the same decision is always given on the same facts, certain legal results may be predicted, just as certain physical results may

16. Notwithstanding the fact that Science and Art relate to distinct departments of human activity, they are intimately connected with each other, and are mutually interdependent. Their connection and interdependence are in fact adumbrations of the connection and interdependence between the human body and the human mind. It is within the province of a Science to set forth the uniform relation of co-existence or sequence between certain acts as causes and certain results as effects. And it is the function of an Art to order those acts to be done if the attainment of those ends is a *desideratum*. Spencer has beautifully set forth the interdependence of Sciences and Arts in his Essay on the Genesis of Science. (See App. 4-*a*).

Any body, who will take the trouble to observe, will find that the interdependence between Sciences and Arts is so close that almost all the comforts and convenience of our daily life owe their origin to the application of the former to the latter. The hydraulic press, whereby a man acting with a force of 10 pounds may transmit a force of 30,000 pounds or more, is the result of the application of the law that pressure exerted anywhere upon a liquid is transmitted undiminished in all directions and acts with the same force on all equal surfaces and in a direction at right angles to those surfaces.

---

be predicted regarding the phenomena of Nature, and that the method followed for predicting such legal results is parallel to the method followed in the physical sciences. The above facts, if granted, can only show that the phenomena of case-law may, by a convention, be made to claim kinship with the phenomena in Nature, and that the student of the phenomena of case-law may be made to proceed on the assumption of the uniformity of connection between certain conditions and certain legal results, and may, by following the scientific method be made to predict that given a certain set of conditions, certain legal results will follow. These facts if established cannot prove that English case-law is a Science and 'may fairly claim kindship with the inductive sciences.' English case-law, as a product, can only be regarded, either as a collection of the rules of the Art of Positive Law made by judges, or as a sub-group of the Phenomena of Positive Law. In the former case it is an Art, and in the latter it is only a group of phenomena.

Alcoholometers, lactometers, &c., owe their origin to the knowledge of the specific gravity of different things, which knowledge is the outcome of the law that a body immersed in a liquid loses a part of its weight equal to the weight of the displaced liquid. Thermometers, barometers, steam-engines, ice-machines, telescopes, microscopes, photographic implements, telegraphic machines, telephones and phonographs each and all are the result of the application of Science to Art.

16. Law,* meaning of course thereby a rule of Positive Law, is defined by Dr. Holland as "a general rule of external human action enforced by a sovereign political authority." (Holl. Juris. p. 36, 3rd ed.) As the above definition is based on the views of Austin concerning 'Law,' it is desirable to quote certain passages from his Lectures on Jurisprudence which furnish materials for the above definition.

"Laws or rules, properly so-called, are a species of commands." (p. 90, 4th ed.)

"If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command." (p. 91).

"Now where it obliges generally to acts or forbearances of a class, a command is a law or rule, but where it obliges to a specific act or forbearance, or to acts and forbearances which it determines specifically or individually, a command is occasional or particular." (p. 95.)

"A law is a command which obliges a person or persons. But as contradistinguished or opposed to an occasional or particular command, a law is a

---

* A recent American author defines law as follows:—

"What is law? Law is the will of the state concerning the civic conduct of those under its authority. This will may be more or less formally expressed: it may speak either in custom or in specific enactment. Law, may moreover, be the will either of a primitive family community such as we see in the earliest periods of history, or a highly organized, fully self-conscious state such as those of our own day. But for the existence of law there is needed in all cases alike: (1) an organic community capable of having a will of its own

command which obliges a person or persons, and obliges generally to acts or forbearances of a class." (p. 98).

"Every Positive Law, or every law simply and strictly so-called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme." (p. 226).

The elements which the analysis of a rule of Positive Law according to the passages quoted above from Austin yields are :—

(1) An expression of a desire :
(2) By a sovereign :*
(3) Addressed to his subjects :
(4) To do or forbear from some act :
(5) Generally :

---

and (2) some clearly recognized body of rules to which that community has, whether by custom or enactment, given life, character, and effectiveness. Law is that portion of the established thought and habit which has gained distinct and formal recognition in the shape of uniform rules backed by the authority and power of Government. The nature of each state, therefore, will be reflected in its law ; in its law too will appear the functions with which it charges itself ; and in its law will it be possible to read its history." (The State by W. Wilson, Ph. D., LL. D., p. 586.)

Regarding the analytical account of law the same author says :—"In thought of the analytical school every law is a command, an order issued by a superior to an inferior. Every Positive Law is 'set by a sovereign person, or sovereign body of persons, to a member or members of the independent political society wherein that person, or body of persons, is sovereign or superior.' In its terms, manifestly, such an analysis applies only to times when the will of the state is always spoken by a definite authority ; not with the voice of custom, which proceeds no one knows whence ; not with the voice of religion, which speaks to the conscience as well as to the outward life, and whose sanctions are derived from the unseen power of a supernatural being; nor yet with the voice of scientific discussion whose authors have no authority except that of clear reason ; but with the distinct accents of command, with the voice of the Judge and the Legislator." (The State by W. Wilson, Sec. 1468, p. 609.)

The conception of Positive Law set forth in the above extracts is akin to the conception of that term formed by Austin or Holland.

*According to Dr. Holland, one of the elements in Austin's analysis of command is "a desire conceived by one rational being that another rational

(6) The expression involving a determination on the part of the sovereign to visit non-compliance with a punishment.

There is a serious omission in the analysis of a rule of Positive Law as it stands. Inspite of the statement that a sovereign desires his subjects to do certain voluntary acts, no notice is taken of the end, proximate or ultimate, for which those acts are desired to be done. The theory of the unlimited power of a sovereign seems to have carried Austin so far away from noticing real facts, that he has, in his analysis of a rule of Positive Law, entirely ignored the element which differentiates voluntary acts from non-voluntary acts, namely, the end for the attainment of which the sovereign commands his subjects to do, or forbear from some acts, generally. Such a serious omission, by Austin, must not lead any of the readers of these pages to infer that the rules of Positive Law require voluntary acts to be done in vain. Nothing can be more absurd than to allege that voluntary acts are ordered to be done, and yet they are ordered for no purpose. Such a proposition is a contradiction in terms.

To do it for the attainment of an end, is the essence of a voluntary act, and if it is done not as a means towards an end, it ceases to be a voluntary act. Opinions may differ as to the end for the attainment of which the rules of Positive Law order some voluntary acts to be done; but all must admit that the voluntary acts ordered by the rules of Positive Law do aim at some important end. Later on we shall have to set

---

being should do or forbear, p. 78, 3rd ed." In the case of a rule of Positive Law the above element will be forthcoming only when one single person is the sovereign in a nation, and the theory is that the supreme political power vests in him as a principal and not as a representative of the nation; for when the theory is that the supreme political power vests in a body of persons the juristic sovereign loses sentiency and along with it rationality. Similarly if the theory is that the supreme political power resides in the nation, and that the monarch represents the aggregate of political units, the rules of Positive Law are not his will but the metaphorical will of the aggregate.

forth the ends aimed at by the rules of Positive Law, suffice it here to state that the ends aimed at by these rules are so important that the entire political power possessed by a nation is employed to secure obedience to those rules, and that a trangression against them often deprives the trangressor of his life and property. Had there been no end to be attained by the acts ordered by the rules of Positive Law, why should they have proceeded from a sovereign? why should they have been addressed to his subjects only? and why should obedience thereto have been secured by a punishment?

17. Having commented upon the analysis of a rule of Positive Law by Austin we have, next, to consider under which of the two departments of human activity the aggregate of such rules falls. In other words, is the aggregate of the rules of Positive Law a 'Science' or an 'Art'?

It is a truism to state that every rule of Positive Law requires some voluntary act or acts to be done. The primary object of a rule of Positive Law, evidently, is that the person to whom the command is addressed should do some *act*. A rule of Positive Law is not formulated with a view that a person addressed should get some *information* regarding the relation of co-existence or sequence among the phenomena in Nature. Each of the rules of Positive Law, to borrow the phraseology of the Arabic Grammar, belongs to the category of *inśha* (declaration) and not to that of *khabar* (information). Such being the case it is clear that the rules of Positive Law cannot be placed under the *genus* of 'Science.' Not falling under the *genus* of 'Science,' we have to see if the rules of Positive Law can be regarded as a *species* of the *genus* which comprises all the rules of Art. A careful examination of the nature of the rules of Positive Law clearly shows that all the essentials of the rules of an Art are to be found in every rule of Positive Law :—

(*a*) Every rule of Art in common with every rule of Positive Law requires some voluntary acts to be

done. So far, therefore, they are identical in nature.

(*b*) Then again every rule of Art requires certain acts to be done for the attainment of certain ends, and we have already shown that every rule of Positive Law also aims at the attainment of an important end. Thus in this essential trait also the rules of Positive Law and the rules of Art are identical.

(*c*) Besides the above two essentials, the rules of other arts possess in common with the rules of Positive Law the characteristic of being general commands relating to courses of conduct as opposed to special orders which enjoin particular actions.

(*d*) The former have also common with the latter the characteristic of being addressed to a rational being and proceeding from another rational being.

(*e*) And last but not least, the rules of Positive Law are not merely arbitrary commands of an unreasonable despot, given for the performance of certain voluntary acts, which have no bearing on the welfare of the nation. They, in fact, are the dictates of the experience, *organised* and *unorganised*, regarding the necessary connection between those acts and the welfare of the nation, or a balance of gain in favour of life, individual and collective; and are expressed by one who can enforce obedience thereto. That being so, the rules of Positive Law are like the rules of other arts based on the necessary connection between conduct and consequences.

So far regarding the points of similarity between the rules of Positive Law, and the rules of any other Art. Besides

having the above points of similarity in *substance* the rules of Positive Law are similar to the rules of other Arts in the form of *expression*. A rule of Positive Law like a rule of any other Art, being a declaration and not an information, is expressed in the *imperative mood*. The typical form of a rule of conduct, be it of Positive Law or of any other Art, is 'Do this act.'

The *proposition* 'Performance of such an act is ordered' may be said to be another form of expressing the same thing. Strictly speaking, however, such is not the case. As a *proposition* does not *create* a relation between two terms, but only gives *information* about the relation which already exists between them, the *proposition* 'Performance of such an act is ordered,' presupposes that a *command* has already been given, and in consequence thereof a relation between 'Performance of such an act' and 'ordered' has come into existence. That being so, it is illogical to say that the *command* 'Do this act' and the *proposition* 'Performance of such an act is ordered,' express the one and the same thing. The former expresses no relation ; but *creates* a relation, and the latter gives *information* regarding the relation which has been *created* by the *command* and in this way embodies the result of the *command*.

Supposing, however, that instead of expressing an existing relation we employ a *proposition* to *create* a relation and thus make it perform the function of a *command* we gain nothing. We, in the first place, put in so many words what the nature of a *command* involves. Secondly, we transform the acts commanded into the form of a *subject* and then predicate of such *subject* by the *object* 'ordered.' Thirdly, the *object* 'ordered' is the common *object* which all the *propositions* containing the rules of positive law must have as one of their terms. (1)

(1) Dr. Holland holds that :—

"Every law is a proposition announcing the will of the State, and implying if not expressing, that the State will give effect only to acts which are

Agreeing with the rules of other Arts in the above characteristics, the rules of Positive Law differ from them in :—

(*a*) The source from which they emanate.

(*b*) The persons to whom they are addressed.

(*c*) The extrinsic punishment whereby obedience thereto is attempted to be secured.

For the rules of other Arts no specific source is requisite. Any one who may have observed the relation of causation between certain voluntary acts and certain results, may frame a set of the rules of Art, for the attainment of certain results; but the rules of Positive Law must proceed from one specific *source*: the source which represents the collective political

---

in accordance with its will, so announced, while it will punish, or at least visit with nullity, any acts of a contrary character." (p. 74).

To call a rule of Positive Law or of any other Art a '*proposition*' is more than we can comprehend. To twist the rules of Positive Law into the forms of *propositions* is, presumably due to Austin's notion that declaratory laws, laws abrogating or repealing existing laws, and inperfect laws are not imperative; and to certain criticism by Frederic Harrison. There can, however, be no doubt, that all the cases stated by Austin, and Harrison can be easily turned into an *imperative* form Mr. Harrison himself has admitted it. Our opinion in this respect is shared by Dr. Markby who says :—

"Austin considers that there are two other objects included within the province of jurisprudence and called laws, which are, nevertheless not commands, namely, declaratory laws, and laws which repeal laws. But, as it seems to me, every such law, if it is addressed by the sovereign one or number to its subjects generally, is a signification of desire and is imperative, falls under Austin's conception of law; though it may only be a complete law, that is, a complete command, when taken in connexion with some other signification of desire. There are, no doubt, cases in which it is somewhat tedious to work out the ways by which a particular form of expression may be brought under this conception, but I am not aware of any cases in which the difficulty is insurmountable." (1)

(1) "Mr. Frederic Harrison gives a number of such cases in an article in the Fortnightly Review, No. 143, N. S., p. 684. But he adds (p. 687), I am far from saying that Austin's analysis of law cannot be applied to all these cases." (The 'Elements of Law' by William Markby, p. 2.)

power of a nation, and which is termed 'sovereign.' By proceeding from a sovereign we mean that he commands those rules to be followed by his subjects irrespective of their being framed by him or by some one for him.

Further, the rules of Positive Law are addressed only to the subjects of a sovereign, while the rules of any other Art are addressed to all persons, who may have a desire to attain the end, which the acts required by the rules are calculated to achieve. It may be observed that, if looked at from one stand point, even this distinction disappears; for in the case of the various Arts too, the rules vary with the persons according to the variation in the objects to which the latter address themselves.

Again, it is the characteristic of the rules of Positive Law that obedience to them is sought through an extrinsic punishment. In the case of the rules of other Arts the only consequence, to which non-compliance leads, is the failure to attain the end aimed at by the rules; but in the case of the rules of Positive Law, disobedience thereto is followed by a punishment. This is due to the fact that disregard of the rules of Positive Law (when rightly framed) brings about disastrous consequences, and that the persons to whom they are directed cannot, in many instances, see for themselves that compliance with those rules is essential for complete life, when it is lived in a state of co-operation.

The above three points of dissimilarity are no doubt, the characteristics, whereby the rules of Positive Law are to be distinguished from the rules of other Arts. None of them, however, can take the rules of Positive Law out of the *genus* of 'Art,' and put them under the *genus* of 'Science.' The mere fact that a rule of Positive Law must emanate from a sovereign, cannot so alter its nature as to transform it from *doing* some act into *knowing* some fact. In the same way the fact that

it is directed to a particular class of persons, or that obedience thereto is attempted to be secured by a punishment, cannot change the nature of a rule of Positive Law. A master may secure compliance with the rules of an Art, by punishing his apprentices; but this process will not, in any imaginable manner, place those rules within the category of 'Science.' Looking at the rules of Positive Law, from the standpoint of the executive government, a sovereign is not only the source of the rules of Positive Law, but also an infallible source, in the sense that the rules of Positive Law promulgated by him must be obeyed, and that for the time being they are the only standard of right and wrong within the sphere of that portion of conduct, which is regulated by Positive Law: speaking, however, sociologically, the position of a sovereign towards the rules of Positive Law is exactly the same as that of any other author in respect of the rules of an Art framed by him.

Each of them gives expression to what he according to his own light finds in Nature :—

"And that a system of laws enacting restrictions on conduct, and punishments for breaking them is a natural product of human life carried on under social conditions, is shown by the fact that in numerous nations composed of various types of mankind, similar actions, similarly regarded as trespasses, have been similarly forbidden." (Justice, Spencer, Sec. 14, p. 21.)

"Many times, and in various ways, we have seen that rights truly so called, originate from the laws of life as carried on in the associated state. The social arrangements may be such as fully recognize them, or such as ignore them in greater or smaller degrees. The social arrangements cannot create them, but can simply conform to them or not conform to them. Such parts of the social arrangements as make up what we call government, are instrumental to the maintenance of rights, here in great measure and there in small measure; but in whatever measure, they are simply instrumental, and whatever they have in them which may be called right must be so called only in virtue of their efficiency in maintaining rights." (Justice, Spencer, S. 98, p. 176.)

18. Accepting the position that Positive Law is an Art, and that its rules invariably order some voluntary acts to be done for the attainment of some end, the question arises as to how the definitions of such legal terms as murder, forgery, contract, mortgage, rent, &c., are to be regarded? Are they forms of commands to do some voluntary act, or do they fall outside the rank of the rules of Positive Law? The definition of a legal term only serves to give the subjects of a sovereign an exact conception of that term and does in no way order any act to be done. It is therefore evident that the definitions of legal terms fall within the province of *knowing*, and cannot be regarded as rules of Positive Law. Figuratively speaking they are to Positive Law what measurement is to the exact sciences. Such definitions may fitly find a place in the Science of Law.

19. There still remains the question raised in section (16) as to what is the ultimate and the proximate end of Positive Law?

If a single individual is placed in a physical environment, he, in order to preserve his life, will have to do certain acts and to abstain from others. In other words he will follow a set of rules regulating his conduct. Those rules will be based on the laws of life as carried on in that physical environment. Such rules, however, will not be the rules of Positive Law.

Again if a large number of individuals happens to live in a particular physical environment, and those individuals, for the preservation of their lives, adjust their acts, independently of one another, to the co-existences and sequences in the environment, they follow a set of rules derived from the laws of life as carried on in their environment. Such rules, like the rules in the case of one individual placed in a physical environment, are not the rules of Positive Law.

The reason why the rules of conduct in either of the above two examples are not the rules of Positive Law is to be

found in the absence of *co-operation* in those cases. There can be no rules of Positive Law without *co-operation* among the units of a nation; but when people unite and begin to *co-operate* the germs of a nation, of sovereignty, and of Positive Law begin to show themselves. Sociologically speaking *co-operation*, which is the direct cause of the birth of the rules of Positive Law, bifurcates in the course of evolution into :—

i—Coercive co-operation, and

ii—Voluntary co-operation.

The first kind of *co-operation* produces, in a nation or body politic, the regulative organ called 'the sovereign,' which in the discharge of its functions promulgates the rules of Positive Law.

The following may be deemed as the history of the *genesis* of the rules of Positive Law. When a people unites to co-operate, in order to enjoy complete life individually and collectively, a necessity for definite lines of action, in particular relations of co-operation, for the units of the body politic, is felt; for in the absence of fixed lines of action, to be pursued by the co-operating units of a nation, disorder and confusion reign supreme. The energies of each of the members of the body politic, instead of acting harmoniously on one point, in order to add to the collective power of that body, and thus to help in gaining complete life for himself and for others, act in conflicting directions, and reduce the national power for gaining complete life to zero. If one man can lift a stone of 100 pounds, it is a question of Arithmetic that 100 such men will be able to lift a stone of ten thousand pounds, provided their united powers operate in the same direction. If, however, twenty of them, instead of lifting pull the stone down while the rest, *i.e.*, 80, are lifting it, the lifting will be impossible. What happens in the simplest form in the above case, takes

place in one of the most complex forms in a nation, in the absence of *co-operation*. In order to meet the above necessity, the body politic evolves a regulative organ, which is called 'the sovereign,' and which, by means of the rules of Positive Law, specifies definite lines of conduct, for such units as occupy distinct relations of *co-operation* in the nation. For instance it fixes definite lines of conduct for masters, for servants, for husbands, for wives, for vendors, for vendees, for others than the owners of a property with reference to that property, for promisors, for promisees, and the like. Such rules of Positive Law, in the constitution of things themselves, have, if rightly framed, for their basis the laws of life, when it is carried on in the associated state; or in other words have their foundations laid in the very nature of man and constitution of things.

From the above outline of the history of the *creation* of the rules of Positive Law, it is manifest that the *proximate end* of the rules of Positive Law is the harmonious co-operation among the units of a nation, and that its *ultimate end* is the attainment of complete life when it is carried on in the associated state.

21. The substance of what has been set forth regarding 'Positive Law' may be summed up as follows:—

(*a*) Positive Law is an Art.

(*b*) Rules of Positive Law are commands and not propositions.

(*c*) Rules of Positive Law are based on the connection between our acts and our life.

(*d*) The characteristics which distinguish the rules of Positive Law from the rules of other Arts are that—

i—They proceed from the sovereign political authority.

ii—They are addressed to the subjects of the sovereign.

iii—They have an extrinsic consequence to secure obedience to them.

(*e*) The proximate end of the rules of Positive Law is harmonious *co-operation*.

(*f*) The ultimate end of the rules of Positive Law is complete life (individual and collective).

20. As *co-operation* gives rise to nations, to sovereignty, and to law, some of the readers of these pages may feel inclined to know some thing about such an important sociological factor, and for the benefit of such readers we give in App. (5) an extract from Herbert Spencer dealing with co-operation.

21. The term 'Law' so far has been used to denote a rule of Positive Law. To that sense, however, such use is not limited. Besides denoting a rule of human action, the term law denotes a *proposition* concerning human *knowledge*. When employed in the latter sense the characteristics, which distinguish the propositions called 'Laws' from other propositions, is that they are such propositions as state the uniform relation of co-existence or sequence among phenomena with qualitative and quantitative exactness, or with qualitative exactness alone. For distinguishing the scientific propositions called 'Law' from the rules of external human action which are also called 'Laws,' such propositions may be termed the 'Laws of Nature.' These must not be confounded with the 'Law of Nature' of the Roman jurists, which according to Dr. Holland is "that portion of morality which supplies the more important and universal rules for the governance of the outward acts of mankind," (page 28). The commands of a sovereign called laws may be termed the 'Laws of the State.'

22. When a word is used to denote more than one meaning, some analogy among such meanings is essential. There must be some common element linking those meanings together which leads to the application of the same word to denote each of them. That being so the analogy between the rules of human action called laws, and the propositions of science which are also called laws, has been discussed by eminent authors (*vide* Appendix 6.)

The points discussed regarding the analogy between the Laws of the State and the Laws of Nature are :—

(1) What is the common element between them ?

(2) Which of the two conceptions was first denoted by the word ' Law ' ?

So far as we are able to judge certain *uniformity, i.e.,* the connection of sequence between two things or to sets of things, is the common element on which the application of the term law to both conceptions is based. In the Laws of Nature there is a perfect uniformity in certain events called effects due to their causes. In the Laws of the State, there is an imperfect uniformity in certain human actions due to the general commands of a sovereign. The uniformity in the former case is perfect as the *causes* are *efficient*, in the latter it is imperfect, because the general commands are not the *efficient* causes of the human actions which they aim to regulate.

The connection of sequence or uniformity has not been expressed in so many words in any of the passages quoted in Appendix (6). Austin speaks of ' a slender analogy ' but does not specify it. Dr. Holland also is not specific about it, but we may infer from his use of the word ' regularity ' or ' method ' that he deems the uniformity to be the common element. Professor Pollock, in clear terms, points out that common element in the Laws of the State is the connection between the command and the obedience. He also points out that,

according to Professor Huxley, the common element is the connection between the breach and the punishment. Sir H. S. Maine says that "from the point of view of the jurist *law* is only associated with *order* through the necessary condition of every true law that it must prescribe, a class of acts or omissions or a number of acts or omissions determined generally," (page. 375).

"Have laws always been characterised by that generality which it is said alone connects them with physical laws or general formulas describing the facts of nature? (375)."

Here instead of the *uniformity* or the connection of sequence we find *generality* to be the common element. If the learned author means by *generality* the *uniformity*, the change becomes mere verbal. If, however, *generality* means something else it cannot be the common element; for all the propositions of Science which are called laws are not general propositions. Some of them are abstract but not general. Regarding the Laws of the State we may also say that they prescribe a *conception* which may be found in all the individuals of a *species*. To say that they prescribe the *aggregate* of the individuals of a *species* passes our humble comprehension. (See Appendix 7).

Wilson speaking of the analogy between the Laws of the State and the Laws of Nature says: "In the one set of laws as in the other there is, it would seem, a uniform prescription as to the operation of the forces that make for life." We confess that we are unable to comprehend the exact import of the passage.

It must be borne in mind that the connection of sequence in the Laws of the State, as we have already pointed out, is merely accidental. The connection between a breach and its punishment, admitting it to be a sequence, in the Laws of the State is fitful. A breach as often goes without punishment

as not. Again punishments are conventional, and extrinsic, and are not inherent in the nature of the rules of Positive Law. Lastly the connection in the case of punishment is confined to the rules* of Positive Law and cannot be traced in the rules of other Arts.

In tracing the connection between the general commands and the acts done in obedience to such commands, we have regarded the acts as the effects of the commands. There is, however, an entirely different standpoint. We may regard those acts as causes, and the good or evil consequences thereof on life, when it is carried on in co-operation, as effects. That connection will be as constant as the connection stated in the case of the Laws of Nature. The constant connection between acts as *causes*, prescribed by the rules of Positive Law, and their effects on life as *effects* does not, however, seem to be the common element which led to the application of the word law to the rules of Positive Law.

23. Regarding priority Dr. Holland is of opinion that the word law originally denoted "a command prescribing a course of action, disobedience to which will be punished," and that "from this vague original use of the term has arisen the large development of uses." Professor Pollock may be deemed to share the same opinion. Sir H. S. Maine, however, is of opinion that "the statement that in all languages law primarily means the command of a sovereign, and has been applied derivatively to the orderly sequence of Nature, is extremely difficult of verification."

We are not in a position to decide which of the two opinions is correct. Granting, however, that the word 'Law' primarily denoted a command, and that its application to the order in Nature was a later development, the transfer was not

*We may state here expressly what has been implied, that we see no reason why the word Law should not be applied to the rules of other Arts as it is applied to the rules of Positive Law.

due to an *extension* of that word to denote a distinct and independent conception, *i. e.* an orderly sequence in Nature. It was due to a *retention* of the application of the word 'Law' to what was formerly within the scope of that term, but was subsequently excluded from it. It came about, we venture to think, in this way. Certain uniformity in the phenomena in Nature, like certain uniformity in human actions, was attributed to general commands (which in the former case were deemed to be Supernatural), and therefore the same word 'Law' was employed to denote each of the two uniformities. Subsequently a differentiation took place and the uniformity in nature, which was once deemed to be the result of Supernatural commands, became the effect of natural causes. Notwithstanding such a separation of the order in Nature from the category of the results of general command, the word 'Law' continued to denote that order.

24. The preceding sections, in which we have discussed the different meanings assigned to the term 'Law,' make it sufficiently clear that that term denotes in the rules of Positive Law acts of the body, and in propositions of Science those of the mind. The above two senses, however, are not the only senses with which we are concerned here. Besides them there is a third sense, which we have to notice. The aggregate of the rules of Positive Law may be regarded as a group of phenomena in Nature, brought about by a plexus of causes physical, intellectual, moral and social, when nations live in the associated state. In this sense we regard the rules of Positive Law as the *perceived* manifestation of human energy, under one particular aspect, and entirely disregard the *inferred* moral motives which led to such manifestation. We also disregard the *ends* for the attainment of which the phenomena have come into existence. We further disregard their *fitness* or *unfitness*, as means to the ends, for the attainment of which they have been devised, though we may incidentally notice the incongruity. In short we consider the rules of

Positive Law as a group of phenomena like the phenomena of heat, or light, or language, or Economics. Herbert Spencer with reference to human activities remarks :

"There are two ways in which men's activities, individual or social, may be regarded. We may consider them as groups of phenomena to be analyzed, and the laws of their dependence ascertained, or, considering them as causing pleasures or pains, we may associate with them approbation or reprobation. Dealing with its problems intellectually, we may regard conduct as always the result of certain forces, or, dealing with its problems morally, and recognizing its outcome as in this case good and in that case bad, we may allow now admiration and now indignation to fill our consciousness." (Political Institutions—Spencer, S. 434, p. 230).

The aggregate of the rules of Positive Law which are the product of human activities may like those activities be regarded *intellectually* as groups of phenomena which do not affect us, or they may be regarded *morally* as means devised for the attainment of harmonious co-operation and complete life, and may be subjected to approbation and reprobation.

To sum up :—

(1) The term 'Law' denotes:—

(*a*) A rule of Art which orders some one to *do* some *act*.

(*b*) A proposition of Science which helps some one to *know* some *fact*.

(2) Besides the above two senses, 'Law' may be deemed to be a group of phenomena in Nature.

To guard against confusion the term 'Law' in these pages stands for a proposition of Science, and the term 'Rule' for a rule of Positive Law.

PRINCIPLE :

25. We have already stated that the proximate end of the rules of Positive Law is the realization of a harmonious

coo-peration among the units of a body politic, with a view to the attainment of complete life, individual as well as collective. This implies that some acts of the co-operating units may be conducive, in the constitution of things themselves, to harmonious *co-operation*, and may bear a uniform relation of causation towards some beneficial results to the individual lives of such units, or to the collective life of the body politic, or to both: that similarly some other acts of those units may be in conflict with harmonious *co-operation*, and may produce injurious results; and that the rules of Positive Law are framed with reference to the uniform connection between some acts and their good or evil effects on life.

The above relations when expressed in the form of scientific propositions will furnish a basis for the rules of Positive Law, and will find a place in that Science of Law which corresponds to the Art of Positive Law.

For the sake of exactness we shall call such propositions of the Science of Law principles. A *principle* in these pages will therefore mean a proposition of that Science of Law which corresponds to the *Art* of Positive Law and which proposition furnishes a basis for the rules of Positive Law.

26. The terms *general* and *abstract* are found in the passages which will be quoted further on, and therefore a definite idea of those terms is necessary. The extract given in Appendix (7) shows what those terms mean. Shortly stated *general* and *abstract* are strictly speaking attributes of a proposition as distinguished from an idea. A general truth is simply a proposition which sums up a number of our actual experiences, and not the expression of a truth drawn from our actual experiences, but never presented to us in any one of them.

PART II.

NATURE AND SCOPE OF THE SCIENCE OF LAW SPECIFIED.

(27). Having given definite meanings to the terms Science, Art, and Law, we are in a position to see what mental images are produced by the expression 'the Science of Law.' We have already shown that each of the terms 'Science' and 'Law' has more than one meaning. It is, therefore, evident that the expression, in question, can not produce one particular state of consciousness. It may, by turns, produce many mental images, and the number of those images will be as the number of the possible combinations between the different *imports* of the terms, 'Science,' and 'Law.' Out of the many possible mental images, which the expression 'the Science of Law' may produce, we are here concerned with two only. The term Law in the expression in question may mean either:

I—The Art of Positive Law: or;

II—The Phenomena of Positive Law.

In the former case, the Science of Law, is that Science which is correlative to the Art of Positive Law and which consists of such propositions as furnish a ground work for the rules of Positive Law. In the latter case 'the Science of Law' is the Science of the Phenomena of Positive Law, resulting from a plexus of causes, physical, intellectual, emotional, moral, and social. We shall call the Science of the Art of Positive Law *Deontology and the Science of the Phenomena of Positive Law Nomology.

---

*Austin calls Deontology the Science of legislation; but legislation is neither more nor less than a process which produces Positive Law; and therefore the Science of legislation, and the Science of the Art of Positive Law, so far as their fitness or unfitness to the ends for which they have been made is concerned, are the same thing; but we prefer to call it the Science of the Art of Positive

(28) Deontology and Nomology are two distinct Sciences; the former being a division of Ethics, and the latter one of Sociology. In order to show the exact relation between Deontology and Ethics, we have to say a few words as to the nature, scope and subject matter of Ethics; for the conceptions of *whole* and *part* are correlative, and there can be no correct idea of a part, without a correct idea of the correlative whole. In the following propositions we set forth the nature, scope and subject matter of Ethics:

(*a*) Ethics is a Science and furnishes a basis for the rules of morality.

(*b*) Human conduct affecting human life, and producing good or bad results to self, or others, or both, is the subject matter of Ethics.

(*c*) Ethics formulates the laws of sequence between human conduct and human life, and investigates

---

Law, and to designate it Deontology. The reason which has led us to such a preference is to be found in the fact that no sooner is the examination of the adjustment of the rules of Positive Law, as means to harmonious co-operation and complete life, relegated to the Science of legislation, than one is misled into thinking that such an examination is foreign to 'the Science of Law' no matter what that expression denotes.

We attribute to this seemingly insignificant cause along with other causes, the absence of systematic works on Deontology setting forth, in a scientific order, the principles of law, examining their soundness and unsoundness, deductively and inductively, and tracing to them the various rules of Positive Law. Such principles of law are no doubt casually expounded in decided cases, scattered promiscuously in the proceedings of legislative bodies, and occasionally met with in books on Positive Law or of legal maxims, but none of the above places is the fittest place for them. Their importance calls for a separate and prominent place of their own.

The following passage from Maine to some extent supports our view: "Taken at its best it (an enquiry into the nature of the laws of God) is a discussion belonging not to the philosophy of law; but to the philosophy of legislation. The jurist, properly so called, has nothing to do with any ideal standard of law or morals. (Early History of Inst., p. 370).

"the elements of that equilibrium between constitution and conditions of existence, which is at once the moral ideal and the limit towards which we are progressing." (Epitome of Synth. Philos. of Spencer by Collins, p. 555).

(*d*) Ethics is divided by Spencer, with reference to its subject matter, into :

i—Absolute.

ii—Relative.

(*e*) Absolute Ethics deals with *perfect conduct* and formulates the laws of an *ideal* man in an *ideal* society.

(*f*) Relative Ethics deals with imperfect conduct and formulates the laws of a *real* man in a *real* society.

(*g*) The relation between Absolute and Relative Ethics is analogous to the relation between *abstract* mechanics and *applied* mechanics, or between Physiology and Pathology.

(*h*) Ethics is also divided, with reference to the *proximate* end to which conduct is adjusted, into :—

i—Temperance.

ii—Justice.

(*i*) Temperance deals with such conduct as *primarily* affects the agent.

(*j*) Justice deals with that conduct, which affects others, so far as non-interference with their life sustaining acts, is concerned.

It must always be borne in mind that the sole object of Ethics is to find out the good and evil effects of human conduct

on human life, and to frame a code of morality accordingly. In App. (8) are given extracts from Spencer showing the nature, scope, and subject matter of Ethics.

28. Having stated that the entire human conduct is the subject matter of Ethics, we have to specify that portion of human conduct which forms the subject matter of Deontology. Strictly speaking, that portion of conduct which primarily affects others, and which is the subject matter of Justice, is the subject matter of Deontology; but, having regard to the real state of things, we may say that such portion of human conduct, as is regulated by the rules of Positive Law, is the subject matter of Deontology. That being so, Deontology may be defined, to be *that division of Ethics which deals with such portion of human conduct as is regulated by the rules of Positive Law.*

Deontology, as such, deems the acts ordered by the rules of Positive Law as voluntary acts affecting human life, and formulates the laws of sequence between those acts and complete life, through harmonious *co-operation.* It has nothing to do, directly, with the causes which brought about the rules of Positive Law into existence, or with the sources from which they emanated, or with the extrinsic devices which have been prescribed to secure obedience to such rules. It has also nothing to do with any effect of such rules other than complete life through harmonious *co-operation.*

Deontology like Ethics is either Absolute or Relative. The former formulates the laws of the mathematically *straight* men co-operating in an *ideal* society, and makes no allowance for the imperfection of existing natures, and the imperfection of their fitness to the conditions of existence. The latter formulates the laws of *real* men in a *real* society, taking into account all the imperfections in their nature, and in their fitness to the actual conditions of existence.

29. The above exposition of the nature and subject matter of Deontology, in general terms, may not be sufficient to give every reader of these pages a clear and definite conception of that Science. It is, therefore, desirable to set forth the matters to be dealt with in a book on Deontology with some detail and, in this way, to deliniate the nature and scope of Deontology.

The contents of a book an Deontology may be as follows :—

(*a*) **Definition of Deontology and the characteristics which distinguish it from cognate Sciences.** Under this head it will be stated that Deontology is a division of Ethics, and that the subject matter of the former is a definite portion of the subject matter of the latter. It will also be distinguished from Politics and Nomology.

(*q*) **Object of Deontology.** Under this head it will be stated that the object of Deontology is to know the effects of the voluntary acts and omissions prescribed by the rules of Positive Law on the life of the body politic and on the lives of its units, and in this way to be in a position to frame good rules and to repeal bad rules.

(*c*) **Definition of the terms employed in the book.** Under this head the definition of the terms 'people,' 'nation,' 'state,' 'sovereign,' 'law,' 'right,' 'duty,' 'will,' 'act,' 'intention,' 'event,' 'negligence,' 'sanction,' &c., may be needful. Strictly speaking a Deontologist has nothing to do with defining many of the above terms. He has simply to investigate the connexion between a definite class of acts (including omissions) and life, regarding those acts as voluntary acts and totally ignoring the causes which led to such acts, and the sociolo-

gical or political position of the agents *inter se* who performed them. The mode in which the so called Science of Law has been handled by the jurists of the last century, however, necessitates an exact definition of the above terms; for they are of common occurrence in the books on Jurisprudence. And the importance of exactly defining the terms used in a book is too manifest to be dilated upon. An omission to do so breeds deplorable confusion. In defining nation, sovereign and law the propositions that a nation is an organism, that a sovereign is a regulative organ and that Positive Law is the function of that regulative organ must not be lost sight of.

(*d*) **The Laws of relation between conduct and consequence stated and established.** Under this head it will first be shown that human conduct has a necessary connexion with human life, and that all the rules of conduct derive their sanction from such connexion. It may also be shown that as the conditions of existence vary the connexion between conduct and consequence varies. For example when the conditions of existence are such that life is to be carried on in families composed of adults and such young members as are unable to support themselves, the law governing the lives of the young is:—that a direct relation between conduct and consequence kills them, and that an indirect relation between conduct and consequence saves them.

The above law will then be proved deductively and inductively. It will also be shown that the law is not limited to human families, and that the families of higher animals are also governed by that law. Next,

the rule of action towards the young, if the preservation of the family is a desidratum, will be laid down. For example it may be stated that :—

> "During immaturity benefits received must be inversely proportionate to capacities possessed. Within the family group most must be given where least is deserved, if desert is measured by worth." (Spencer. Justice, s. 92, p. 4.) In other words :—"During early life before self sustentation has become possible, and also while it can be but partial, the aid given must be the greatest where the worth shown is the smallest, benefits received must be inversely proportionate to merits possessed : merits being measured by power of self sustentation."—(Justice, p. 7.)

The above law will be shown to be the basis of all the principles which underlie the rules of Positive Law regulating the conduct of the adult members of families towards the young members of such families, and the corresponding rule of action may be shown to be the general formula of all the rules of Positive Law regulating the conduct of the adult towards the young.

It will also be shown that after maturity, when we contemplate individuals carrying on life-sustaing acts in a definite environment, the law is :—that a direct relation between conduct and consequence preserves life and that an indirect relation between conduct and consequence destroys life. The law may then be established deductively and inductively. It may also be shown that it governs higher animals as well as human beings. It may further be stated that the survival of the fittest is the outcome of the above law (see App. 9). Next, the rule of action for adults *inter se* based on the above law may be laid down. For example it may be set forth that :—

> "Each individual ought to receive the benefits and the evils of his own nature and consequent conduct ; neither being prevented

from having whatever good his actions normally bring him, nor allowed to shoulder off on to other persons, whatever ill is brought to him by his actions." (Justice, p. 17.)

As a corollary of the above rule of action for the adult, it may be shown that a grown up individual in a physical environment has a complete freedom of action, his acts affecting *his* life only. This will pave the way for stating that the appearance of *co-operation*, in a body of grown up individuals, imposes a limitation on the complete freedom of action of each and all. The life sustaining acts carried on, by each and all, are restrained by the need for non-interference with the like acts of the co-operating individuals. The law under such conditions of existence is:—that in a co-operating body of persons the limited freedom of action of each and all saves life and that interference with such limited freedom destroys life.*

The law of limited freedom may also be proved deductively and inductively, and may be shown to apply to

* In illustrating the proposition that associated life imposes certain restraints on our activities, Herbert Spencer remarks:—"We come now to the truth—faintly indicated among lower beings and conspicuously displayed among human beings—that the advantages of co-operation can be had only by conformity to certain requirements which association imposes. The mutual hindrances liable to arise during the pursuit of their ends by individuals living in proximity, must be kept within such limits as to leave a surplus of advantage obtained by associated life. Some types of men, as Abors, lead solitary lives, because their aggressiveness is such that they can not live together. And this extreme case makes it clear that though, in many primitive groups, individual antagonisms often cause quarrels, yet the groups are maintained because their members derive a balance of benefit—chiefly in greater safety. It is also clear that in proportion as communities become developed, their division of labour complex, and their transactions multiplied, the advantages of co-operation can be gained only by a still better maintenance of those limits to each man's activities necessitated by the simultaneous activities of others. This truth is illustrated by the unprosperous or decaying state of communities in which the trespasses of individuals on one another are so numerous and great as generally to prevent them from severally receiving the normal results of their labours." (Justice, p. 20.)

some extent to higher animals. It may be shown that the law of limited freedom has for its foundation the laws of life as carried on in *co-operation.*

Having stated the law of limited freedom and established it, the general rule of action based on that law may be laid down. For example it may be stated that :—

> Each individual carrying on the actions which subserve his life, and not prevented from receiving their normal results, good and bad, shall carry on these actions under such restraints as are imposed by the carrying on of kindred actions by other individuals, who have similarly to receive such normal results good and bad.* (Justice, p. 21).

Besides the limitation imposed by co-operation there is another limitation. In cases in which the conditions of existence are such as by the occasional sacrifices of some members of a nation, the nation as a whole leads a higher life such sacrifices are necessary.†

(6) **The law of limited freedom a corollary of the laws of life.** Having set forth the laws of conduct and consequence under various conditions of existence, it will be shown that the law of the limited freedom is their corollary, and that it is the funda-

---

* This is the rule of limited freedom or natural equity, and a precise expression of it is :—

"Every man is free to do that which he wills provided he infringes not the equal freedom of any other man". (Justice 46). Spencer calls this the formula of justice. Put into the imperative mood it runs as follows :—Act within your limited sphere of action in such a way as not to interfere with others acting within their respective limited spheres of action.

† "If the constitution of the species and its conditions of existence are such that sacrifices, partial or complete, of some of its individuals, so subserve the welfare of the species that its members are better maintained than they would otherwise be, then there results a justification for such sacrifices." (Justice, s. 4, p. 7.)

mental law of Deontology. It may be shown that the law of limited freedom is the law of natural equity, in which "*equality* concerns the mutually limited spheres of action." (Justice, p. 43.) The dicta of Absolute and Relative Deontology with reference to the law of limited freedom may also be set forth.

(*f*) **Laws based on the law of limited freedom.** After establishing the law of limited freedom, other derivative laws may be set forth and may be proved deductively, and inductively, and the various rules of Positive Law may be shown to be based on those laws.

For example the law of 'physical integrity' as a condition precedent to carry on life sustaining acts, may be shown to be a deduction from the law of limited freedom or of natural equity, and may be established inductively, by showing that unnecessary trespass on physical integrity of the units of a body politic leads to national decay and disintegration. After establishing the law of physical integrity it may be shown that in Absolute Deontology the law is unqualified; but that in Relative Deontology such trespass on physical integrity as is needful for national safety is sanctioned.

Similarly the law of the ownership of property may be deduced from the law of limited freedom, and the perfect non-interference with that law, which is the dictate of Absolute Deontology may be shown to be qualified in Relative Deontology, according to which each individual may be called upon to contribute towards the cost of protection, national and individual. The law of Absolute Deontology and of Relative Deontology may also both be established inductively. The rules of Positive Law which aim at the protection

of property will be shown to be founded on the law of the ownership of property.

In setting forth the laws of various degrees of generality, establishing them deductively and inductively and showing them to be the basis of the various rules of Positive Law, a prominent place must be given to those specific *principles* of law, on which the rules, of the law of crimes, the law of property, the law of contracts, the law of torts, the law of trusts, and the law of wills, are alleged to be based. The origin of those principles must be traced to their fountain head, namely, the law of limited freedom, and they must be shown to be so many derivative laws from their fountain head. It must be established that a balance of advantage, in favour of the body politic and its members, is decidedly gained by conformity to the rules, based on the said *principles* Likewise the *principles* which furnish a ground work, for the rules of Procedure, Evidence, Limitation and the like may be enumerated, their origin traced and their good or evil results to the body politic and to its members scrutinized. The soundness of the said *principles* may be proved, by establishing that the rules of the Adjective Law, based on them, afford in the particular stage of the evolution of the body politic, for which they are framed, the simplest, the safest, the cheapest and the surest possible modes for the protection of legal rights, and the enforcement of legal remedies.

By way of illustration we have stated, in App. (10) some of the rules of Positive Law, and the *principles* on which they are deemed to be based. We have, given them at some length for two reasons :—

(1) To show, in the first place, that the *principles* of law, which furnish a ground work for the rules

of the Art of Positive Law, deserve a prominent place in Deontology—the Science of the Art of Positive Law.

(2) To invite, in the second place, the attention of the students of Positive Law to the fact that its rules, from a scientific stand-point, are not arbitrary inventions of the sovereign political authority. This authority, in fact, gives only a definite shape to what it finds in Nature, and for a scientific study of Positive Law, it is essential that all its rules should be shown to be the application of the *principles* of law expressing a connection between acts and life, and stating that the acts prescribed by those rules are conducive to harmonious *co-operation*, and to complete life.

(*g*) **Laws which govern abnormal units.** After setting forth the laws of various degrees of generality dealing with the relation of the *normal* units of a body politic *inter se*, the laws dealing with the relations of *abnormal* units, such as infants, lunatics and the like, may be set forth and established inductively and deductively.

(*h*) **Laws of the relation of individuals towards the State.** After the laws of political units *inter se*, the laws dealing with the relations of each normal or abnormal unit towards the State may be set forth, and established, both deductively and inductively.

(*i*) **Examination of the principles of law.** Under this head the soundness of the *principles*, on which the rules of Positive Law are alleged to be based, may be fully examined, first in the abstract, and then with reference to the particular stage of evolution, and the

particular type of the body politic to which they are intended to apply, substituting sound *principles* for unsound *principles*. As an outcome of the above examination and scrutiny necessary reforms in the rules of Positive Law may be suggested.

As an illustration of the mode in which the rules of Positive Law may be examined or justified we have given in App. (11) some extracts from Herbert Spencer.

30. Deontology is possible, if there is a necessary connection between conduct and life, and all that has been stated, in the sections dealing with Deontology, is based on such a connection. There are, however, many persons whose political creed is that the rules of Positive Law are the *creatures* of the State, and that there is no other origin for good and bad in conduct than law. In order to show them that human conduct and public affairs are as much subject to the law of causation, as the rest of the Phenomena in Nature, we give some extracts from Herbert Spencer in App. (12).

31. The substance of what has been stated regarding Deontology may be set forth in the following propositions:—

(*a*) Deontology is a division of Ethics.

(*b*) Deontology, as a Science, is correlative to the Art of Positive Law.

(*c*) The subject matter of Deontology is that portion of conduct which is regulated by the rules of Positive Law.

(*d*) Deontology deals with the definite portion of conduct regulated by Positive Law with special reference to its effects on human life.

(*e*) Deontology is based on the necessary connection between human conduct and human life.

(*f*) Deontology is divided into :—

i—Absolute.

ii—Relative.

32. *Nomology* in contradistinction to *Deontology* is the Science of the Phenomena of Positive Law, and as such, is a division of *Sociology*. If we look into the subject matter of *Nomology* we shall find it to be totally different from the subject matter of *Deontology*. *Nomology* does not regard that portion of human conduct, which is regulated by the rules of Positive Law, as means devised for the attainment of complete life, through harmonious *co-operation*. It regards such portion of human conduct as a group of phenomena in Nature, to be considered *intellectually* (as distinguished from *morally*). The subject matter of *Nomology* consists of :—

(*a*) The causes physical, intellectual, emotional, moral and social which produce the phenomena of Positive Law.

(*b*) The history of the evolution of the phenomena of the entire Positive Law and of its various parts.

(*c*) The laws of co-ordination or interdependence of the various parts of the phenomena of Positive Law.

(*d*) The laws of the co-existence of the phenomena of Positive Law, and of its various parts with other social phenomena.

(*e*) The effects physical, intellectual, emotional, moral and social of the phenomena of Positive Law, and of its various rules, on the society in which they exist.

The above exposition of the subject matter of Nomology, in general and abstract terms, may prove too abstruse for many readers of these pages, and with a view to help them in forming a clear and definite conception of the Nature and scope of Nomology, the matters to be dealt with in a book on Nomology are stated here categorically. Such a book will contain : —

(1.) **A definition of the Phenomena of Positive Law,** stating so many essentials and characteristics thereof as may be sufficient to give the student of Nomology an exact and clear conception of the class of phenomena to be dealt with. This, of course, will be introductory.

(2.) **A statement of the causes,** physical, intellectual, emotional, moral, religious and social, which lead to the *genesis* and evolution **of the Phenomena** as a whole, and of the particular portions thereof emerging as the rules **of Positive Law.** For example the character of the physical environment, the structure of the habitat, the relative position of water and land, the climate, the fertility of the land, the mineral products, the flora and fauna of the habitat, each of which factors furthers or hinders political integration, and consequently the *genesis* and evolution of the Phenomena of Positive Law, may be stated among the objective physical causes. The physique of the men and women, composing the body politic, may also be stated as the subjective physical cause. Again the character of the units of the body politic, their intellectual and emotional nature, their moral habits, may be stated as the intellectual and moral causes of the Phenomena of Positive Law. The social

customs of the body politic, its religious ideas, and the co-existence of other socities at war or peace with the body politic, may be enumcrated among the social causes of the phenomena. The factors which lead to the integration and differentiation of a body politic may also find a fitting place. The plexus of the causes enumerated above will determine the type of the body politic, the nature of the State and its relation towards other units of the body politic, and these, in their turn, will determine the character of the Positive Law, and of its rules.

(3. **The natural history of the Phenomena of the entire Positive Law, and of its particular rules.** Under this head may be set forth:—

(*a*) The order in which customary laws, Divine laws, judge-made laws and statutory laws come into existence and disappear, illustrating the law of the survival of the fittest.

(*b*) The natural history of each rule with its causes and effects.

(*c*) The definitions of legal terms with their history.

(*d*). "Laws may be exhibited under this head as accumulating in mass, as dividing and subdividing into kinds, as becoming increasingly definite, as growing into co-herent and complex systems, as undergoing adaptation to new conditions." (Spencer, Pol. Inst, s. 535, p. 534). The above remarks of Spencer, if expressed in general terms, mean the integration and differentiation of the Pheno-

mena of Positive Law which are the necessary phases of its evolution.

(4.) **The interdependence of the various rules of Positive Law.** Translated in general terms it means an exposition of the laws of co-existence and sequence among the various portions of the phenomena of Positive Law.

(5). **The fitness of the different rules of Positive Law to different types of society, and to different stages of the same type.** In other words the laws of co-existence between the various rules of Positive Law and other social Phenomena.

(6). **The effects, physical, intellectual, moral and social of the rules of Positive Law, on a body politic and on its units.** These will be the laws of sequence, the rules of Positive Law being the causes, and the other social phenomena their effects.

So far it may be noticed, we have shown that the mental image produced by the expression 'the Science of Law' varies as the meanings, assigned to the term 'Law' in that expression, vary. If the term 'Law' in that expression means the Art of Positive Law which "becomes in its final form simply an applied system of Ethics or rather of that part of Ethics, which concerns men's just relations with one another, and with the community." (Spencer, Pol. Inst., s. 534, p. 534), the Science of Law is a branch of Ethics. If on the other hand the term 'Law' in that expression denotes the Phenomena of Positive Law "the Science of Law" is a branch of Sociology; and that in order to guard against confusion we have termed 'the Science of the Art of Positive Law,' Deontology, and 'the Science of the Phenomena of Positive Law,' Nomology. We have also shown that Deontology *morally* regards the acts regulated

by the rules of Positive Law, as voluntary acts required to achieve harmonious *co-operation* and complete life, and that Nomology studies *intellectually* those acts as doings of alien creatures which it merely concerns us to understand.

33. After stating the distinctive marks of Deontology and Nomology, it is worth while to show some points of connection between the two. A thorough knowledge of the natural history of a particular rule of Positive Law may, for instance, not only help us to understand the essential elements of that rule, as distinct from the non-essential additions thereto; but also to grasp the causes which produced the rule and subjected it to changes. Such an insight may, at once, enable a legislator to see whether or not the rule, as it stands, is fit for the body politic for which it is intended. It will also enable him to see the amendment which will bring it into harmony with the stage of evolution of the body politic. In this way, Nomology may prove a boon to Deontology. Nomology may show that the causes which produced certain rules of Positive Law have ceased to exist; and a law-giver taking the advantage of such acknowledge may at once repeal those rules.

Again, among the other effects of the rules of Positive Law, their conduciveness to harmonious *co-operation*, and complete life may be examined *intellectually* without an alloy of sentiment, and the results thus obtained may prove a blessing to the students of Deontology wherein freedom from sentimental bias is not an easy matter.

The study of the structure and the functions of the rules of Positive Law is a fit subject of Nomology, and a definite and clear conception of them may be of immense value to the students of Deontology.

As an illustration of the mode of dealing with the history of a system or of a branch of Positive Law, we have given in

App. (13) the history of *jus gentium* from Austin, and the history of the law of security from Dr. Markby.

The following extract from Snell's Principles of Equity will show a fictitious *principle* of law forming a basis for a set of the rules of Positive Law, and a modification of those rules on finding that *principle* to be a fiction pure and simple :—

"In no respect did the rules of equity show a more complete divergence from those of the old common law than on the subject of the rights and liabilities of married women."

"By the old common law the husband on marrying became entitled to receive the rents and profits of the wife's real estates during the joint lives: (*a*); and he became absolutely entitled to all her chattels personal in possession (*b*), and to her choses in action upon reducing them into possession during the coverture (*c*), or if he did not, but survived her, he (*d*), and after his death his administrator (*e*), on taking out administration to the wife, was entitled to recover these choses in action of the wife. He also became entitled *jure mariti* to her chattles real, *i. e.*, leaseholds, with full power to alienate them even though reversionary (*f*), provided only that by any possibility they were capable of falling into possession during the coverture, and not otherwise (*g*), though, if he died before his wife without having reduced into possession her choses in action (*h*), or without having alienated her chattles real (*i*), they survived to her."

"The husband acquired these extensive interests in the property of his wife in consideration of the obligation which upon marriage he contracted of

(*a*) Polyblank v. Hawkins, Doug 329, Moore v. Minten, 12 Sim, 161.

(*b*) Co-Litt., 300a.

(*c*) Scawen v. Blunt, 7 ves. 294 ; Wildman v. Wildman, ves. 174 ; Co-Litt. 351.

(*d*) Betts v. Kimpton, 2 B. & Ad. 277; Proudley v. Fielder, 2 My. & K. 57.

(*e*) In the goods of Harding, L. R. 2 P. & D. 394; Fleet v. Perrins, L. R. 3 2, B. 536 ; Re Wensley, 7 P. D. 13.

(*f*) Donne v. Hart, 2 Russ. & My. 363 ; Bates v. Dandy, 2 Atk. 207 ; 3 Russ. 27 n ; and see in re *Bellamy*, *Elder* v. Pearson, 25 ch. Div. 620.

(*g*) Duberley v. Day, 16 Beav. 33 ; and see In re Bellamy, Elder v. Pearson, 25 ch. Div. 620.

(*h*) Co-Litt. 351 *b*.

(*i*) I bid.

maintaining her; but the old court of common law gave the wife no remedy whatever in case of the husband's refusing or neglecting to fulfil the duties cast upon him by the marriage, or in the case of the husband's bankruptcy or insolvency; so that a married woman might have been left utterly destitute, no matter how large a fortune she might have brought to her husband on her marriage; and it was therefore that equity raised up, with reference to married women, a system founded on justice and right, and utterly in contravention of the doctrines of the old common law; and so beneficial was the equitable jurisdiction found by experience to be, and so much in harmony with the requirements of modern society, that it received at length legislative sanction by the Married Women's Property Act, 1870, amended by the Married Women's Property Act, 1874, both which acts have since been consolidated and amended by the Married Women's Property Act, 1882, hereinafter more particularly stated." Snell's Principles of Equity of p. 422 to 423.

In the above extract we find a number of the rules of common law based on the *principle* of the merger of the existence of wife into that of husband on coverture. We also find that the relation of sequence between merger and coverture expressed in the *principle*, turns out, on a careful examination, by the Equity Judges, to be a metaphor pure and simple, and as a result we find a new set of rules based on the right *principle* of the wife's separate existence, which rules are found to be beneficial inductively and therefore sanctioned by Legislation.

The above are our ideas regarding the 'Science of Law,' its bifurcation into Deontology and Nomology and the nature and scope of each of those two branches. But we are not in a position to say whether those ideas will be accepted or rejected by the present and the future generations of jurists and lawyers. Time will only decide their fate. One thing may reasonably be hoped, and it is this that if our ideas find favour with the coming generations of jurists and lawyers, fresh fields of investigation will be opened up, a new type of books on Deontology and Nomology will come into existence, and the study of the Science and the Art of Law will be placed on a true and solid foundation.

PART III.

JURISPRUDENCE AS CONCEIVED BY AUSTIN AND OTHERS CRITICISED.

34. Let us now examine the nature and scope of Jurisprudence as conceived by Austin or Dr. Holland and see :—

(1). What relation Jurisprudence as conceived by Austin or Dr. Holland bears to :—

(*a*) Deontology,

(*b*) Nomology.

(2). What topics treated of in their valuable works on Jurisprudence belong to :—

(*a*) Deontology,

(*b*) Nomology.

We begin with Austin. The extracts given in App. (14) from his Lectures or Jurisprudence (fourth edition) will show what conception he formed of Jurisprudence. They disclose two elements in the conception of General Jurisprudence, one of which is negative and the other positive. By the negative element we mean the statement which shows what General Jurisprudence is not; and by the positive element we mean the statement which shows what General Jurisprudence is.

The negative element in the conception of General Jurisprudence has been stated with sufficient definiteness. "General Jurisprudence or the Philosophy of Positive Law' is not concerned directly with the science of legislation," (p. 33) and to examine whether a system of Positive Law is 'worthy of praise or blame' and whether 'it accords or not with an

assumed measure or test, (p. 33)' is foreign to it. This (in other words) is conclusive in showing that General Jurisprudence is distinct from Deontology.

Regarding the positive element in General Jurisprudence we are told first that "it is concerned with the exposition of the principles, notions and distinctions common to the (maturer) systems of law," (p. 1108.) Secondly, Hobbes is quoted to show the subject and scope of General Jurisprudence. He says "My design is to show not what is law here and there but what is law" (p. 33.) Thirdly, we are informed that "the proper subject of General or Universal Jurisprudence (as distinguished from Universal Legislation) is a description of such subjects and ends of law as are common to all systems; and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in their several positions," (p. 1112.)

In order to comprehend the definite conception, which each of the three passages is intended to convey, we have to know the definite meaning of some of the terms of general import, which have been employed in the said passages. The word 'notions' means notions of duty, right, liberty, injury, punishment, redress and the like. The word 'distinctions' means the distinction between written and unwritten law the distinction of rights into *rights in rem* and *rights in personam*, the distinction of obligations into obligations *ex contractu* and *ex delicto*, the distinction of injuries into crimes and torts, and the distinction of law into "*jus personarum* and *jus rerum*". The meaning of the term 'principles' has not been explained and the omission is apt to introduce obscurity in the conception produced by the expression. A reference to the matters treated of in the Lectures, however, leads us to infer that the term is superfluous, in as much as only 'notions' and 'distinction' are dealt with, and no part of the work is devoted to 'principles.' The term 'exposition'

with reference to 'notions,' we understand, means, to define those notions, with reference to a particular theory regarding sovereignty, to analyse such of them as is deemed fit, and to criticise the definitions and analyses of those terms which are held to be wrong with reference to that theory. 'Exposition' with reference to 'distinctions' we understand means the classification of the aggregates denoted by the terms law, right, obligation, injury and the like with reference to some basis, and the criticism of their classification made by others. The expression 'the maturer systems of law' means the Roman Law, the Continental systems based on it and the English Law; and if we take into consideration the fact that almost all the 'notions and distinctions' current in the works on Roman Law have been borrowed by writers on English Law, that expression is reduced to the narrow compass of the Roman Law and the systems which are either derived from it or have drawn upon it for those notions and distinctions. For instance in the exposition of those notions and distinctions, no notice is taken of the Hindu, the Mohammadan or the Chinese Law. The following passages from Austin partially support our suggestion:—"I shall examine the arrangement of the Roman lawyers in their institutional and elementary writings, an arrangement which I believe to be just in the main, and which is unquestionably the ground work of most of the modern attempts to give a systematic shape to the whole body of any system of law," (vol. II, p. 525). The expression "subjects and ends of law as are common to all systems" has been employed to convey some idea regarding which we are in the dark. Presumably it means the regulation of certain social relations for the well-being of a body politic.

35. To sum up, the positive element in the conception of General Jurisprudence according to Austin is:—

(*a*). The exposition of the 'notions and distinctions common to the maturer systems of Positive Law.'

(*b*). The exposition of the nature of (Positive) Law.

(*c*). The description of such subjects and ends of Positive Law as are common to all systems.

Our criticism of the above is, (*a*) that the above three statements regarding the positive element in the conception of General Jurisprudence, can not be reconciled with one an other and a reference to the contents of the Lectures shews that Austin's own treatment answers, only to the conception given in (*a*) and not to that given either in (*b*) or (*c*).

Now let us examine whether an exposition, as given by Austin, of the notions and distinctions common to the so-called maturer systems of Positive Law, can come within the scope of 'Science' in general and of Nomology in particular.

The first is the determination of the Province of Jurisprudence. Now the determination of the province of a branch of knowledge is not, we dare say, a scientific proposition and can not, therefore, be placed under any Science much less under Nomology. Austin himself admits that a determination of "the Province of Jurisprudence though necessary or inevitable" is merely prefatory, (p. 35).

Then follows a definition of certain terms. Now the terms which are made use of in a system of Positive Law may be divided into two classes:—

(*a*). Those which are peculiar to that system, and to which definite technical meanings have been given by that system.

(*b*). Those which are not peculiar to any system of Positive Law, nor have they been defined by any system; but have been used by writers on a system of Positive Law either in the same sense in which they are employed in other Sciences or Arts, or in a modified sense.

If those terms, such as murder, robbery, forgery, extortion, rent, mortgage, are the terms which have been defined by a system of Positive Law, a knowledge of them though not a knowledge of commands is a knowledge of some thing which is closely connected with that system, and can be discussed in the Science of Law in either of its two imports; but if the terms are such as have not been defined by any system of Positive Law, such as duty, right, sovereignty, and the like, then to define them or to criticise their definition by other writers, call it by whatever name, General Jurisprudence, Philosophy of Law, or Science of Law can constitute neither the Science of Positive Law, nor the Art of Positive Law. For instance what knowledge of any rule of Positive Law, or of any scientific proposition regarding a *principle* of law can we gain from the following passages?

"Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or I lie under a duty to obey it." (Austin 91). Again what scientific knowledge does any body get from the erroneous division of duties into absolute and relative, or from the following remarks dealing with the division of injuries into crimes and civil injuries (torts)?. "An offence which is pursued at the discretion of the injured party or his representative is a Civil Injury. An offence which is pursued by the sovereign or by the subordinates of the sovereign is a crime." (p. 417). This is tantamount to merely stating that those injuries which are *regarded* as crimes by the State are crimes and those injuries which are declared by it to be civil injuries, are civil injuries, and the right to sue in the former case is reserved to the State. No scientific knowledge is thereby imparted.

Further the division of the rules of Positive Law, on the basis of their sources, or on the basis of their purposes is no integral part of Positive Law, and therefore any classification,

which an author may choose and any fault-finding with other classifications of those rules in which he may indulge, can form no integral part of any Science, which has any concern with Positive Law. It has already been shown that *classification* is an Art, and the Science, which is *correlative* to the Art of classification can not possibly be the same as the Science of the Phenomena of Positive Law. Such being the case any classification of the rules of a system of Positive Law, granting that it is the best possible, can claim no place in 'Nomology.'

The matters treated of by Austin in his Lectures on Jurisprudence, seem to have presented themselves to his mind in the following order :—

Law, (meaning thereby a rule of Positive Law) is a command. As a command it proceeds from a sovereign, and is directed to some subject of that sovereign. The subject to whom the command is directed lies under a duty, which binds him to do some act or to forbear from some act. If the act or forbearance is not for the benefit of a determinate subject the duty is absolute ; but if it is for the benefit of a determinate subject the duty is relative. When the duty is relative the determinate subject, for whose benefit the duty is imposed, is deemed to have a right. Such rights are therefore creatures of law. Again a subject upon whom a duty is imposed may be guilty of a breach of the duty, and may thus cause an injury.

Having thought out the plan of his work in the above outline, Austin proceeds to define such terms as he deems essential in the above outline, to analyze others and to criticise the definitions and analyses made by other writers. After the analysis of the pervading notions, he classifies Positive Law first with reference to its sources, and secondly with reference to its purposes. In short the greater portion of the Lectures is devoted to the definition of notions which pervade Positive Law, and of classification of various departments

thereof, and it is not easy to designate such matters by the term 'Science.' In the above view we are supported by Sir Henry Maine who holds that the majority at least of the matters dealt with by Austin does not belong to the category of Science.

"An important distinction between Bentham and Austin is not as often recognised as it ought to be. Bentham in the main is a writer on Legislation. Austin in the main is a writer on Jurisprudence. Bentham is chiefly concerned with law as it might be and ought to be. Austin is chiefly concerned with law as it is. Each trespasses occasionally on the domain of the other. Unless Bentham had written the treatise called the 'Fragment on Government.' Austin's 'Province of Jurisprudence Determined,' which sets forth the basis of his system, would never probably have been composed. On the other hand Austin, in his singular discussion of the theory of utility as an index to the Law of God, has entered on an investigation of the class followed by Bentham. Still the description which I have given of their objects is sufficiently correct as a general description, and those objects are widely different. Bentham aims at the improvement of the law to be effected by the application of the principles now indissolubly associated with his name. Almost all of his more important suggestions have been adopted by the English Legislature, but the process of engrafting on the law what to each successive generation seem to be improvements is in itself of indefinite duration, and may go on, and possibly will go on, as long as the human race lasts. Austin's undertaking is more modest. It would be completed, if a Code were produced perfectly logical in order of arrangement and perfectly lucid in statement of rule. Jurisprudence, the Science of Positive Law, is sometimes spoken of now-a-days as if it would bring the substance of the law into a state of indefinite perfection. It would doubtless, if it were carried far, lead indirectly to great legal reforms by dispelling obscurities, and dissipating delusions, but the investigation of the principles on which the direct improvement of substantive legal rules should be conducted belongs nevertheless not to the theorist on Jurisprudence but to the theorist on Legislation. (Early History of Institutions, Maine, p. 343 to 345).

36. It must not, however, be supposed that there is nothing in the valuable Lectures of Austin which may lay a claim to be placed under the category of Science. The following topics treated by him may, for instance, find a place in Nomology:—

(1) A correct and exact definition of Positive Law. This however is a perfatory matter and not an integral

part of Nomology. The following passage from Austin partially supports our position :—

"Having determined the province of Jurisprudence, distinguished from particular Jurisprudence, and analysed certain notions which pervade the Science of Law, I shall leave that merely prefatory, though necessary and meritable matter, and shall proceed, in due order to the various departments and sub-departments under which I arrange or distribute the bulk of my subject." (p. 35, 4th ed).

Professor Pollock also holds that the exposition of the various meanings of the term law are not within the scope of Jurisprudence.

"The subjects discussed at the outset are naturally the definition of law and the theory of sovereignty. The two chapters on the various usages of the word law might perhaps bear to be yet further shortened. I should doubt, indeed, whether their subject is properly within the scope of Jurisprudence" (Pollock —Essays in Jurisprudence and Ethics, p 9.)

(2) The terms 'right' and 'duty' may be defined and analysed with reference to their essential elements, in order to show that they are deduced from the law of limited freedom, and that the conceptions formed of these terms are symbols of realities. Of course this also will be a preliminary step.

(3) In order to make the conception of Positive Law very distinct and definite, the terms nation and sovereign may be defined. Those definitions will show the correlative connection between a nation and its sovereign. It also will show that, sociologically speaking, a sovereign is a regulative organ which a society on reaching the *national* stage evolves, and that, in discharging its function of protecting against internal enemies, it formulates Positive Law.

(4) The sources of law, *i.e.*, custom, religion, adjudication, interpretation, and legislation, may find a fit place under the head of the Evolution of Law in Nomology.

(5) The modes, in which the rules of Positive Law die out may also be set forth under the natural history of such rules.

(6) The history of *jus gentium* may find a place in the evolution of that system.

37. We now turn to the ideas of Dr. Holland regarding the term jurisprudence. His ideas are presumably based on the ideas of Austin, and hence there is much affinity between them. The extracts from his Elements of Jurisprudence, (see App. 15) give his ideas regarding Jurisprudence. With due deference to an eminent jurist like Dr. Holland, we submit that the passages given in App. (15) fail to produce a definite conception of Jurisprudence, in our humble mind. They do not produce *one* conception of Jurisprudence, sharply marked out from all other conceptions; nor do they present to us the various elements of the conception with sufficient clearness.

The chief among the objective reasons, for such an unsatisfactory result, seem to be the following :—

(*a*) The first reason is that exact meanings have not been assigned to the important terms Science and Law in defining Jurisprudence.

(*b*) The second reason is that the points of likeness and unlikeness, between the conception of Jurisprudence and other akin conceptions, have not been stated with precision, in one place ; nor have the positive and negative elements of the said conception been set forth.

Fragmentary statements bearing upon the nature, function, and province of Jurisprudence have been scattered over so many pages and its analogy to Grammar and alliance with Ethics, Metaphysics, Archaeology and History have been mentioned. We are told that :—

"Jurisprudence is a Formal or Analytical Science."—(8).

"There is analogy between Grammar and Jurisprudence."—(9.)

"Jurisprudence is an Abstract Science."—(10.)

"Jurisprudence elucidates the meaning of prescription in its relation to ownership and to actions, or to explain the legal aspects of marriage and its connection with property and family."—(10).

"Jurisprudence is the Formal Science of those relations of mankind which are generally recognized as having legal consequence "—(12).

"Its (of Jurisprudence) generalisations must keep pace with the movement of the systems of actual law."—(13).

"Broader distinctions (of Jurisprudence) corresponding to deep seated human characteristics will no doubt be permanent."—(13).

"Jurisprudence is closely allied to Ethics, Metaphysics, Archaeology and History."—(26.)

"Jurisprudence exhibits a unity underlying all the Phenomena which it investigates."—(16).

"Jurisprudence begins when those facts begin to fall in an order."—(16.)

"The Province of Jurisprudence is to observe the wants for the supply of which laws have been invented, and the manner in which those wants have been satisfied."—(16.)

"Jurisprudence is concerned not so much with the purposes which Law subserves as with the means by which it subserves them."—(16.)

To obtain a well defined and coherent mental image from the perusal of the above fragnentary statements, is too much to expect. Passage No. (19), in App. (15) sets forth in effect, that Jurisprudence is concerned with legal rights. This in a way shows that Jurisprudence is concerned with legal rights but the specific 'concern' has not been stated. We can not say if Jurisprudence is concerned with:

(1) Defining legal rights : or

(2) Classifying legal rights with reference to some basis of classification : or

(3) Tracing legal rights to the law of natural equity, or the law of the greatest good to the greatest number, or the sweet will of the sovereign political authority.

We need hardly point out that many other kinds of 'concern' may be given, and we also need hardly point out that the nature and function of Jurisprudence will vary as the import of 'concern' varies. For instance if Jurisprudence merely defines legal rights, it is another name for 'Substantive Law.' If it classifies legal rights it is an Art based on the Science of classification. If it traces them to the law of natural equity from a *moral* point of view it is a branch of Ethics. This however is not all. When we endeavour to reconcile one of the numerous modes of 'concern' of Jurisprudence with what is alleged of Jurisprudence in passage No. (16), in App. (15) we find ourselves unable to do so. In that passage we find that "The Province of Jurisprudence is to observe the wants for the supply of which laws have been invented and the manner in which those wants have been satisfied."

First, we are not told what the learned author means by "the wants for the supply of which laws have been invented." As to whether he means by them the preservation of life and the protection of property, or harmonious co-operation and complete life, or any other wants, we are in the dark. One thing, however, is beyond doubt, namely, that the Jurisprudence which is concerned with legal rights and the Jurisprudence the province of which is to observe the wants for the supply of which laws have been invented, can hardly be the one and the same Science. Again the same Jurisprudence is said to divide acts into lawful and unlawful. To make acts lawful and unlawful can not possibly be the function of any Science. Correctly speaking it is the function of a sovereign political authority, and by a metaphor is the function of Positive Law. Further we are told that Jurisprudence elucidates the meaning of prescription in its relation to ownership and to actions; and the legal aspects of marriage and its connection with property and family. We assume that the expression "the meaning of prescription in its relation to ownership and to

actions" means the reasons on which the law of prescription is based, and if the assumption is right then Jurisprudence will consist of the *principles* of law and will be identical with Deontology. We are unable to grasp the meaning of the expression "Jurisprudence elucidates the legal aspect of marriage and its connection with property and family." The legal aspects of marriage evidently are that it creates certain *rights in personam* between the parties to the marriage and certain *rights in rem* with reference to the rest of the world. And we fail to see in what way Jurisprudence 'elucidates' that aspect. Again Jurisprudence is said to be analogous to Grammar and to be allied to Ethics, Metaphysics, Archaeology, and History; but the points of similarity and dissimilarity between Jurisprudence and each of the above four branches of knowledge are not set forth.

(*c*) The third reason is that ambiguous terms and expressions of general and indeterminate *import*, such as: (1) 'general principles,' (2) 'legal Science,' (3) 'legal facts,' (4) 'legal Phenomena,' (5) 'principles which exist independently of the institution of any particular country,' (6) 'Science of Law,' (7) 'formal unity,' (8) 'scheme of the purposes, methods and ideas common to every system of law,' (9) 'abstract Science,' (10) 'broader distinctions corresponding to deep rooted human characteristics,' have been employed and their imports have not been defined.

(*d*) The fourth reason is that concrete examples illustrating the general statements, have not been given —Jurisprudence, no doubt, has been stated to be analogical to Grammar; but the analogy as we have shown (App. 15, note) is not a real one.

38. Having shown that fragmentary statements regarding the term Jurisprudence, are not sufficient to convey to our mind

a definite conception of that term, let us see if the contents of the 'Elements of Jurisprudence' can help us to obtain the desired conception. The contents of the first part of the treatise are: Jurisprudence, Laws as Rules of Human Action, Positive Law, the Sources of Law, the Object of Law, Rights, Analysis of a Right, the Leading Classification of Rights, and Rights at Rest and in Motion.

Those who have carefully read our remarks regarding the matters dealt with by Austin, will, we presume, at once, see that the majority of the topics treated of by Dr. Holland, in the first part of his work, can hardly be regarded as the essential parts of Nomology. From the second part of the book a portion of the chapter on Adjective Law is given in (App. 15), in order to show that the propositions contained therein can find no place under the *genus* Science much less under Nomology.

The propositions that :

(1) An English Court 'will hardly hear an application for a divorce unless the parties are domiciled in the country: (p. 292.)

(2) It is also necessary that proceedings be taken in the appropriate Court: (p. 292.)

(3) In a suit the following stages are distinguishable, *i. e.*, citation, pleading, trial, judgment, and appeal. (p. 292):

can hardly be said to bear analogy to the propositions of Grammar.

These propositions in no way 'deal with the various relations which are regulated by legal rules.' There is nothing in them of 'a scheme of the purposes, methods, and ideas common to every system of law'. We fail to see in them any thing of, 'the formal Science of those relations of mankind which are

generally recognised as having legal consequences.' We also fail to understand in what way can those propositions be said 'to observe the wants for which laws have been invented, and the manner in which those wants have been satisfied.' Correctly speaking the above extract is nothing but a summary of Procedure, and to call it by the pleasing name of 'the Formal Science of Positive Law' or by the grandest possible name is of little avail. Such a name can only serve to mislead.

39. The following passages in Dr. Markby's 'Elements of Law,' have a bearing on the nature of the Science of Law :—

"But the only preparation and grounding which a University is either able or I suppose, would be desirous to give, is in law considered as a Science, or at least if it is no yet possible, in law considered as a collection of principles, capable of being systematically arranged, and resting not on mere authority but on sound logical deduction, all departures from which in existing systems, must be marked and explained. In other words, law must be studied in University, not merely as it has resulted from the exigencies of society, but in its general relations to the several parts of the same system and to other systems." (p. xi.)

"Being told that the law contains such and such a rule it will be his business to examine it, to ascertain whence it sprang, its exact import, and the measure of its application. Having done so, he must assign to it its proper place in the system, and must mark its relations with the other parts of the system to which it belongs. This will require a comparison with analogous institutions in other countries, in order to see how far it is a deduction from those principles of law which are generally deemed universal and how far it is peculiar to ourselves." (p. xiii).

With profound respect to the learned lawyer, we fail to see how the Art of Positive Law, or the Phenomena of Positive Law can be considered as a Science in reality, or how either of them can be considered as a collection of principles. We also fail to realise the process whereby it is possible to raise either the Art or the Phenomena of Positive Law to the level of a Science. Again we are unable to consider law as a collection of principles *resting not on mere authority but on sound logical deduction*, as, in the first place, we are not told of the materials from which we have to deduce, and

secondly, we do not know if we have to deduce the rules of law or the principles. Again we do not know what is meant by the general relations of one rule of Positive Law to other rules of the same system, and to the rules of other systems. Further we are not told what the principles of law are which are generally deemed universal,

The above remarks make it clear that the passages quoted from the 'Elements of Law' are not sufficient to give us a definite conception of 'the Science of Law,'

40 In the History of English Law by Sir F. Pollok and Maitland we find the following passage:—

It has been usual for writers commencing the exposition of any particular system of law to undertake, to a greater or less extent, philosophical discussion of the nature of laws in general, and definition of the most general notions of Jurisprudence. We purposely refrain from any such undertaking. *The philosophical analysis and definition of law belongs, in our judgment, neither to the historical, nor to the dogmatic Science of Law, but to the theoretical part of politics.* A philosopher who is duly willing to learn from lawyers the things of their own art is fully as likely to handle the topic with good effect as a lawyer even if that lawyer is acquainted with philosophy, and has used all due diligence in consulting philosophers. The matter of legal Science is not an ideal result of ethical or political analysis, it is the actual result of facts of human nature and history." (The History of English Law by Sir F. Pollock and Maitland. p. 1, 2nd ed.)

We are told in the passage that the philosophical analysis and definition of law do not belong to the historical or dogmatic Science of Law. They belong to the theoretical part of politics. Historical Science of Law presumably means the Science of Law treated from the stand-point of Evolution. We, however, are unable to understand what a dogmatic Science of Law means. We are also unable to see what the phrase "the theoretical part of politics" means in the passage, and how the analysis and definition of the term law can belong to politics and not to the Science of Law.

41 In App. (16) we give a short extract from 'The State' by Wilson who like many others holds that Jurisprud-

ence is the Science of Law from the historical or evolution point of view. He also states that in the hands of another school (analytical) Jurisprudence has been narrowed down to the dimensions of a Science of Law, in its modern aspect only.

As the author is silent on the examination of the fitness or unfitness of the rules of Positive Law with harmonious *co-operation*, in his Science of Law, be it historical or analytical, we presume it to be distinct from Deontology. Granting Wilson's Jurisprudence to be a part of Nomology, the historical and analytical schools although dealing with different aspects of the Phenomena of Positive Law will yet be expounding the same Science.

42. Sheldon Amos has written two books. One is called by him. 'A Systematic View of the Science of Jurisprudence' and the other 'The Science of Law.' In App. (17) we give some extracts, from them which contain the following propositions:—

(*a*) The Science of Jurisprudence may be said, broadly, to deal with the necessary and formal facts expressed in the very structure of Civil Society, as that structure is modified and controlled by the facts of Civil Government and the constitution of human nature and the physical universe.

(*b*) The Science of Jurisprudence has for its purport the noting and classifying of all the sequences of fact brought about by the contact of the fact of Law with all other facts of human life, carried on as that life is in the midst of the actual and indestructible conditions of the physical world.

(*c*) The Science of Jurisprudence deals with the facts brought to light through the operation upon the

fact of Law (considered as such,' and neither as good nor bad) of all other facts whatsoever, including among these other facts, the facts resulting in the creation, and expressing the historical and logical vicissitudes, of Law itself.

(*d*) All the Phenomena of Law may be distributed under the three main heads:—

(1) All the historical vicissitudes attending the formal communication of the will of the person or persons imposing the law.

(2) All enumeration of the essential contents of any single law viewed as a command proceeding from a competent authority and purporting to control the acts of the persons in the community.

(3) The logical arrangement or classification of all the particular and accidental materials of which all possible Systems of Law are composed.

(*e*) The Science of Jurisprudence has for its purpose the investigation of all the possible modes in which the operation of Law is qualified by the existence of all the other facts which belong to the material or the moral universe.

(*f*) Many of the topics treated in both works are the same.

(*g*) The determination of the moment at which a new family group takes its rise is of the utmost concern to the State; and further more, the importance of keeping distinct from one another the different groups is of scarcely inferior concern.

(*h*) Such are the problems before the legislator in the matter of divorce in their most general form.

(*i*) The peculiar dangers to which the institution of these so-called 'endowments' is exposed are of the following kinds.

(*j*) Trial by jury supplies a popular mode of estimating the moral guilt that enters into the legal crimes.

(*k*) General obedience to law is secured by punishing crimes.

(*l*) The subject of 'costs,' that is, of who is to pay the expenses of the trial is one of far greater magnitude than it seems.

The above propositions read along with the extracts which contain them lead us to infer that the distinction between Deontology and Nomology is not present to the mind of the learned author, He seems to hold that the Science of Jurisprudence is not concerned with the examination of the merits of the rules of Positive Law, and in this respect he is at one with Austin and Dr. Holland. He also holds that the Science of Law, if not identical with, is closely allied to, Jurisprudence, and this goes to show that the two conceptions, namely, Deontology and Nomology conveyed by the expression the "Science of Law' are not distinct to him. One fact however is clear and it is this that the Science of Law and Jurisprudence as conceived by the learned author have nothing to do with the examination of the goodness or badness of the rules of Positive Law, and hence a discussion of the *principles* on which the rules of Positive Law are based is foreign to Jurisprudence as well as to the Science of Law. We however find that in the 'Science of Law' the reasons, on which the rules of Positive Law are based, are discussed and in this way the topics peculiar to Deontology are treated of. This only illustrates that the learned author has not kept the topics of Deontology separate from the topics of Nomology.

APPENDICES.

APPENDIX I.

There has ever prevailed among men a vague notion that scientific knowledge differs in nature from ordinary knowledge. By the Greeks, with whom Mathematics—literally *things learnt*—was alone considered as knowledge proper, the distinction must have been strongly felt; and it has ever since maintained itself in the general mind. Though, considering the contrast between the achievements of science and those of daily unmethodic thinking, it is not surprising that such a distinction has been assumed; yet it needs but to rise a little above the common point of view, to see that no such distinction can really exist: or that at best, it is but a superficial distinction. The same faculties are employed in both cases; and in both cases their mode of operation is fundamentally the same. If we say that science is organized knowledge, we are met by the truth that all knowledge is organized in a greater or less degree—that the commonest actions of the house-hold and the field presuppose facts colligated, inferences drawn, results expected; and that the general success of these actions proves the data by which they were guided to have been correctly put together. If, again, we say that science is prevision—is a seeing beforehand—is a knowing in what times, places, combinations, or sequences, specified phenomena will be found; we are yet obliged to confess that the definition includes much that is utterly foreign to science in its ordinary acceptation. For example, a child's knowledge of an apple. This, as far as it goes, consists in prevision. When a child sees a certain form and colours, it knows that if it puts out its hand it will have certain impressions of resistance, and roundness, and smoothness; and if it bites, a certain taste. And manifestly its general acquaintance with surrounding objects is of a like nature—is made up of facts concerning them, so grouped as that any part of a group being perceived, the existence of the other facts included in it is foreseen. If, once more, we say that science is *exact* prevision, we still fail to establish the supposed difference. Not only do we find that much of what we call science is not exact, and that some of it, as physiology, can never become exact; but we find further, that many of the previsions constituting the common stock alike of wise and ignorant, *are* exact. That an unsupported body will fall; that a lighted candle will go out when immersed in water; that ice will melt when thrown on the fire—these, and many like predictions relating to the familiar properties of things, have as high a degree of accuracy as predictions are capable of. It is true that the results predicated are of a very general character; but it is none the less true that they are rigorously correct as far as they go: and this is all that is requisite to fulfil the definition. There is perfect accordance between the anticipated phenomena and the actual ones; and no

more than this can be said of the highest achievements of the sciences specially characterised as exact.

Seeing thus that the assumed distinction between scientific knowledge and common knowledge is not logically justifiable; and yet feeling, as we must, that however impossible it may be to draw a line between them, the two are not practically identical; there arises the question—What is the relationship that exists between them? A partial answer to this question may be drawn from the illustrations just given. On reconsidering them, it will be observed that those portions of ordinary knowledge which are identical in character with scientific knowledge, comprehend only such combinations of phenomena as are directly cognizable by the senses, and are of simple, invariable nature. That the smoke from a fire which she is lighting will ascend, and that the fire will presently boil water, are previsions which the servant-girl makes equally well with the most learned physicist; they are equally certain, equally exact with his; but they are previsions concerning phenomena in constant and direct relation—phenomena that follow visibly and immediately after their antecedents—phenomena of which the causation is neither remote nor obscure—phenomena which may be predicted by the simplest possible act of reasoning. If, now, we pass to the previsions constituting what is commonly known as science—that an eclipse of the moon will happen at a specified time, that when a barometer is taken to the top of a mountain of known height, the mercurial column will descend a stated number of inches; that the poles of a galvanic battery immersed in water will give off, the one an inflammable and the other an inflaming gas, in definite ratio—we perceive that the relations involved are not of a kind habitually presented to our senses; that they depend, some of them, upon special combinations of causes; and that in some of them the connection between antecedents and consequents is established only by an elaborate series of inferences. The broad distinction, therefore, between the two orders of knowledge, is not in their nature, but in their remoteness from perception. If we regard the cases in their most general aspect, we see that the labourer, who, on hearing certain notes in the adjacent hedge, can describe the particular form and colours of the bird making them; and the astronomer, who, having calculated a transit of venus, can delineate the black spot entering on the sun's disc, as it will appear through the telescope, at a specified hour; do essentially the same thing. Each knows that on fulfilling the requisite conditions, he shall have a preconceived impression—that after a definite series of actions will come a group of sensations of a foreknown kind. The difference, then, is not in the fundamental character of the mental acts; or in the correctness of the previsions accomplished by them; but in the complexity of the processes required to achieve the previsions. Much of our commonest knowledge is, as far as it goes, rigorously precise. Science does not increase this precision; cannot transcend it. What then does it do? It reduces other knowledge to the same degree of precision. That certainty which direct perception gives us respecting

co-existences and sequences of the simplest and most accessible kind, science gives us respecting co-existences and sequences, complex in their dependencies or inaccessible to immediate observation. In brief, regarded from this point of view, science may be called *an extension of the perceptions by means* of *reasoning*.

On further considering the matter, however it will perhaps be felt that this definition does not express the whole fact—that inseparable as science may be from common knowledge, and completely as we may fill up the gap between the simplest previsions of the child and the most recondite ones of the natural philosopher, by interposing a series of previsions in which the complexity of reasoning involved is greater and greater, there is yet a difference between the two beyond that which is here described. And this is true. But the difference is still not such as enables us to draw the assumed line of demarcation. It is a difference not between common knowledge and scientific knowledge; but between the successive phases of science itself, or knowledge itself—whichever we choose to call it. In its earlier phases science attains only to *certainty* of foreknowledge; in its later phases it further attains to *completeness* We begin by discovering *a* relation: we end by discovering *the* relation. Our first achievement is to foretell the *kind* of phenomenon which will occur under specific conditions: our last achievement is to foretell not only the kind but the *amount*. Or, to reduce the proposition to its most definite form—undeveloped science is *qualitative* previsions: developed science is *quantitative* prevision.

Spencer, Essay on the Genesis of Science, p. 158-161.

PPENDIX 2.

The metaphor which M. Comte has here so inconsistently used to express the relations of the sciences—branches of one trunk—is an approximation to the truth, though not the truth itself. It suggests the facts that the sciences had a common origin ; that they have been developing simultaneously ; and that they have been from time to time dividing and sub-dividing. But it does not suggest the yet more important fact, that the divisions and sub-divisions thus arising do not remain separate, but now and again re-unite in direct and indirect ways They inosculate ; they severally send off and receive connecting growths ; and the intercommunion has been ever becoming more frequent, more intricate, more widely ramified. There has all along been higher specialization, that there might be a larger generalization ; and a deeper analysis, that there might be a better synthesis. Each larger generalization has lifted sundry specializations still higher ; and each better synthesis has prepared the way for still deeper analysis.

And here we may fitly enter upon the task a while since indicated—a sketch of the Genesis of Science, regarded as a gradual outgrowth from common knowledge—an extention of the perceptions by the aid of the reason. We propose to treat it as a psychological process historically displayed ; tracing at the same time the advance from qualitative to quantation prevision ; the progress from concrete facts to abstract facts, and the application of such abstract facts to the analysis of new orders of concrete facts ; the simultaneous advance in generalization and specialization ; the continually increasing sub-division and reunion of the sciences ; and their constantly improving *consensus*.

To trace out scientific evolution from its deepest roots would, of course, involove a complete analysis of the mind. For as science is a development of that common knowledge acquired by the unaided senses and uncultured reason, so is that common knowledge itself gradually built up out of the simplest perceptions. We must, therefore, begin somewhere abruptly ; and the most appropriate stage to take for our point of departure will be the adult mind of the savage.

Commencing thus, without a proper preliminary analysis, we are naturally somewhat at a loss how to present, in a satisfactory manner, those fundamental processes of thought out of which science ultimately originates. Perhaps our argument may be best initiated by the proposition, that all intelligent action whatever depends upon the discerning of distinctions among surrounding

things. The condition under which only it is possible for any creature to obtain food and avoid danger is, that it shall be differently affected by different objects—that it shall be led to act in one way by one object, and in another way by another. In the lower orders of creatures this condition is fulfilled by means of an apparatus which acts automatically. In the higher orders the actions are partly automatic, partly conscious. And in man they are almost wholly conscious. Throughout, however, there must necessarily exist a certain classification of things according to their properties—a classification which is either organically registered in the system as in the inferior creation, or is formed by experience, as in ourselves. And it may be further remarked, that the extent to which this classification is carried, roughly indicates the height of intelligence—that, while the lowest organisms are able to do little more than discriminate organic from inorganic matter, while the generality of animals carry their classifications no further than to a limited number of plants or creatures serving for food, a limited number of beasts of prey, and a limited number of places and materials; the most degraded of the human race possess a knowledge of the distinctive natures of a great variety of substances, plants, animals, tools, persons, &c., not only as classes but as individuals.

What now is the mental process by which classification is effected? Manifestly it is a recognition of the *likeness* or *unlikeness* of things, either in respect of their sizes, colours, forms, weights, textures, tastes, &c., or in respect of their modes of action. By some special mark, sound, or motion, the savage identifies a certain four-legged creature he sees, as one that is good for food, and to be caught in a particular way; or as one that is dangerous; and acts accordingly. He has classed together all the creatures that are *alike* in this particular. And manifestly in choosing the wood out of which to form his bow, the plant with which to poison his arrows, the bone from which to make his fish-hooks, he identifies them through their chief sensible properties as belonging to the general classes, wood, plant, and bone, but distinguishes them as belonging to sub-classes by virtue of certain properties in which they are *unlike* the rest of the general classes they belong to; and so forms genera and species.

And here it becomes manifest that not only is classification carried on by grouping together in the mind things that are *like*; but that classes and sub-classes are formed and arranged according to the *degrees* of *unlikeness*. Things widely contrasted are alone distinguished in the lower stages of mental evolution; as may be any day observed in an infant. And gradually as the powers of discrimination increase, the widely contrasted classes at first distinguished, come to be each divided sub-classes, differing from each other less than the classes differ; and these sub-classes are again divided after the same manner. By the continuance of which process, things are gradually arranged into groups, the members of which are less and less *unlike*; ending,

finally, in groups whose members differ only as individuals, and not specifically. And thus there tends ultimately to arise the notion of *complete likeness*. For manifestly, it is impossible that groups should continue to be sub-divided in virtue of smaller and differences, without there being a simultaneous approximation to the notion of *no difference*.

Let us next notice that the recognition of likeness and unlikeness, which underlies classification, and out of which continued classification evolves the idea of complete likeness—let us next notice that it also underlies the process of *naming*, and by consequence *language*. For all language consists, at the beginning, of symbols which are as *like* to the things symbolized as it is practicable to make them. The language of signs is a means of conveying ideas by mimicking the actions or peculiarities of the things referred to. Verbal language is also, at the beginning, a mode of suggesting objects or acts by imitating the sounds which the objects make, or with which the acts are accompanied. Originally these two languages were used simultaneously. It needs but to watch the gesticulations with which the savage accompanies his speech—to see a Bushman or a Kaffir dramatizing before an audience his mode of catching game—or to note the extreme paucity of words in all primitive vocabularies; to infer that at first, attitudes, gestures, and sounds were all combined to produce as good a *likeness* as possible of the things, animals, persons, or events described; and that as the sounds came to be understood by themselves the gestures fell into disuse, leaving traces, however, in the manners of the more excitable civilized races. But be this as it may, it suffices simply to observe, how many of the words current among barbarous peoples are like the sounds appertaining to the things signified; how many of our own oldest and simplest words have the same peculiarity; how children tend to invent imitative words; and how the sign-language spontaneously formed by deaf-mutes is invariably based upon imitative actions—to at once see that the notion of *likeness* is that from which the nomenclature of objects takes its rise. Were there space we might go on to point out how this law of likeness is traceable, not only in the origin but in the development of language; how in primitive tongues the plural is made by a duplication of the singular, which is a multiplication of the word to make it *like* the multiplicity of the things; how the use of metaphor—that prolific source of new words—is a suggesting of ideas that are *like* the ideas to be conveyed in some respect or other; and how, in the copious use of simile, fable, and allegory among uncivilized races, we see that complex conceptions, which there is yet no direct language for, are rendered, by presenting known conceptions more or less *like* them.

This view is further confirmed, and the predominance of this notion of likeness in primitive times further illustrated, by the fact that our system of presenting ideas to the eye originated after the same fashion. Writing and printing

have descended from picture-language. The earliest mode of permanently registering a fact was by depicting it on a wall; that is—by exhibiting something as *like* to the thing to be remembered as it could be made. Gradually as the practice grew habitual and extensive, the most frequently repeated forms became fixed, and presently abbreviated; and, passing through the hieroglyphic and ideographic phases, the symbols lost all apparent relation to the things signified: just as the majority of our spoken words have done.

Observe again, that the same thing is true respecting the genesis of reasoning. The *likeness* that is perceived to exist between cases, is the essence of all early reasoning and of much of our present reasoning. The savage, having by experience discovered a relation between a certain object and a certain act, infers that the *like* relation will be found in future cases. And the expressions we constantly use in our arguments—"*analogy* implies," "the cases are not *parallel*," "by *parity* of reasoning," there is no *similarity*," —show how constantly the idea of likeness underlies our ratiocinative processes. Still more clearly will this be seen on recognising the fact that there is a certain parallelism between reasoning and classification; that the two have a common root; and that neither can go on without the other. For on the one hand, it is a familiar truth that the attributing to a body in consequence of some of its properties, all those other properties in virtue of which it is referred to a particular class, is an act of inference. And, on the other hand, the forming of a generalization is the putting together in one class, all those cases which present like relations; while the drawing a deduction is essentially the perception that a particular case belongs to a certain class of cases previously generalized. So that as classification is a grouping together of *like things*; reasoning is a grouping together of *like relations* among things. Add to which, that while the perfection gradually achieved in classification consists in the formation of groups of *objects* which are *completely alike*; the perfection gradually achieved in reasoning consists in the formation of groups of *cases* which are *completely alike*.

Once more we may contemplate this dominant idea of likeness as exhibited in art. All art, civilized as well a savage, consists almost wholly in the making of objects *like* other objects; either as found in Nature, or as produced by previous art. If we trace back the varied art-products now existing, we find that at each stage the divergence from previous patterns is but small when compared with the agreement; and in the earliest art the persistency of imitation is yet more conspicuous. The old forms and ornaments and symbols were held sacred, and perpetually copied. Indeed, the strong imitative tendency notoriously displayed by the lowest human races, ensures among them a constant reproducing of likenesses of things, forms, signs, sounds, actions and whatever else is imitable; and we may even suspect that this aboriginal

peculiarity is in some way connected with the culture and development of this general conception, which we have found so deep and wide spread in its applications.

And now let us go on to consider how, by a further unfolding of this same fundamental notion, there is a gradual formation of the first germs of science. This idea of likeness which underlies classification, nomenclature, language spoken and written, reasoning, and art; and which plays so important a part because all acts of intelligence are made possible only by distinguishing among surrounding things, or grouping them into like and unlike;—this idea we shall find to be the one of which science is the special product. Already during the stage we have been discribing, there has existed *qualitative* prevision in respect to the commoner phenomena with which savage life is familiar; and we have now to inquire how the elements of *quantitative* prevision are evolved. We shall find that they originate by the perfecting of this same idea of likeness; that they have their rise in that conception of *complete likeness* which, as we have seen, necessarily results from the continued process of classification.

For when the process of classification has been carried as far as it is possible for the uncivilized to carry it—when the animal kingdom has been grouped not merely into quadrupeds, birds, fishes, and insects, but each of these divided into kinds—when there come to be sub-classes, in each of which the members differ only as individuals, and not specifically; it is clear that there must occur a frequent observation of objects which differ so little as to be indistinguishable. Among several creatures which the savage has killed and carried home, it must often happen that some one, which he wished to identify, is so exactly like another that he cannot tell which is which. Thus, then, there originates the notion of *equality*. The things which among ourselves are called *equal*—whether lines, angles, weights, temperatures, sounds or colours—are things which produce in us sensations that cannot be distinguished from each other. It is true that we now apply the word *equal* chiefly to the separate phenomena which objects exhibit, and not to groups of phenomena; but this limitation of the idea has evidently arisen by subsequent analysis. And that the notion of equality did thus originate, will, we think, become obvious on remembering that as there were no artificial objects from which it could have been abstracted, it must have been abstracted from natural objects; and that the various families of the animal kingdom chiefly furnish those natural objects which display the requisite exactitude of likeness

The same order of experiences out of which this general idea of equality is evolved, gives birth at the same time to a more complex idea of equality; or, rather, the process just described generates an idea of equality which further experience separates into two ideas—*equality of things* and *equality of relations*,

While organic and more especially animal forms, occasionally exhibit this perfection of likeness out of which the notion of simple equality arises, they more frequently exhibit only that kind of likeness which we call *similarity*; and which is really compound equality. For the similarity of two creatures of the same species but of different sizes, is of the same nature as the similarity of two geometrical figures. In either case, any two parts of the one bear the same ratio to one another, as the homologous parts of the other. Given in any species, the proportions found to exist among the bones, and we may, and zoologists do, predict from any one, the dimensions of the rest; just as, when knowing the proportions subsisting among the parts of a geometrical figure, we may, from the length of one, calculate the others. And if, in the case of similar geometrical figures, the similarity can be established only by proving exactness of proportion among the homologous parts; if we express this relation between two parts in the one, and the corresponding parts in the other, by the formula A is to B as *a* is to *b*; if we otherwise write this, A to B=*a* to *b*; if, consequently, the fact we prove is that the relation of A to B *equals* the relation of *a* to *b*; then it is manifest that the fundamental conception of similarity is *equality of relations*. With this explanation we shall be understood when we say that the notion of equality of relations is the basis of all exact reasoning. Already it has been shown that reasoning in general is a recognition of *likeness* of relations, and here we further find that while the notion of likeness of things ultimately evolves the idea of simple equality, the notion of likeness of relations evolves the idea of equality of relations: of which the one is the concrete germ of exact science, while the other is its abstract germ. Those who cannot understand how the recognition of similarity in creatures of the same kind, can have any alliance with reasoning, will get over the difficulty on remembering that the phenomena among which equality of relations is thus perceived, are phenomena of the same order and are present to the senses at the same time; while those among which developed reason perceives relations, are generally neither of the same order, nor simultaneously present. And if further, they will call to mind how Cuvier and Owen, from a single part of a creature, as a tooth, construct the rest by a process of reasoning based on this equality of relations, they will see that the two things are intimately connected, remote as they at first seem. But we anticipate. What it concerns us here to observe is, that from familiarity with organic forms there simultaneously arose the ideas of *simple equality*, and *equality of relations*.

Spencer, Essay on the Genesis of Science, p. 184—192.

APPENDIX 2-A.

Without further argument, it will, we think, be sufficiently clear that the sciences are none of them separately evolved—are none of them independent either logically or historically; but that all of them have, in a greater or less degree, required aid and reciprocated it. Indeed, it needs but to throw aside hypothesis, and contemplate the mixed character of surrounding phenomena, to at once see that these notions of division and succession in the kinds of knowledge are none of them actually true, but are simply scientific fictions: good, if regarded merely as aids to study; bad, if regarded as representing realities in Nature. Consider them critically, and no facts whatever are presented to our senses uncombined with other facts—no facts whatever but are in some degree disguised by accompanying facts: disguised in such a manner that all must be partially understood before any one can be understood. If it be said, as by M. Comte, that gravitating force should be treated of before other forces, seeing that all things are subject to it, it may on like grounds be said that heat should be first dealt with; seeing that thermal forces are everywhere in action; that the ability of any portion of matter to manifest visible gravitative phenomena depends on its state of aggregation, which is determined by heat; that only by the aid of thermology can we explain those apparent exceptions to the gravitating tendency which are presented by steam and smoke, and so establish its universality; and that, indeed, the very existence of the solar system in a solid form is just as much a question of heat as it is one of gravitation. Take other cases:—All phenomena recognised by the eyes, through which only are the data of exact science ascertainable, are complicated with optical phenomena; and cannot be exhaustively known until optical principles are known. The burning of a candle cannot be explained without involving chemistry, mechanics, thermology. Every wind that blows is determined by influences partly solar, partly lunar, partly hygrometric; and implies considerations of fluid equilibrium and physical geography. The direction, dip, and variations of the magnetic needle, are facts half terrestrial, half celestial—are caused by earthly forces which have cycles of change corresponding with astronomical periods. The flowing of the gulf-stream and the annual migration of icebergs towards the equator, depending as they do on the balancing of the centripetal and centrifugal forces acting on the ocean, involve in their explanation the Earth's rotation and spheroidal form, the laws of hydrostatics, the relative densities of cold and warm water, and the doctrines of evaporation. It is no doubt true, as M. Comte says, that "our position in the solar system, and the motions, form, size, and equilibrium of the mass of our world among the planets, must be known before we can understand the phenomena going on at its surface." But, fatally for his hypothesis, it is also true

that we must understand a greater part of the phenomena going on at its surface before we can know its position, &c., in the solar system. It is not simply that, as we have already shown, those geometrical and mechanical principles by which celestial appearances are explained, were first generalized from terrestrial experiences ; but it is that the very obtainment of correct data, on which to base astronomical generalizations, implies advanced terrestrial physics. Until after optics had made considerable advance, the Copernican system remained but a speculation. A single modern observation on a star has to undergo a careful analysis by the combined aid of various sciences—has to *be digested by the organism of the sciences* ; which have severally to assimilate their respective parts of the observation, before the essential fact it contains is available for the further development of astronomy. It has to be corrected not only for nutation of the earth's axis and for precession of the equinoxes, but for aberration and for refraction : and the formation of the tables by which refraction is calculated, presupposes knowledge of the law of decreasing density in the upper atmospheric strata ; of the law of decreasing temperature, and the influence of this on the density ; and of hygrometric laws as also affecting density. So that, to get materials for further advance, astronomy requires not only the indirect aid of the sciences which have presided over the making of its improved instruments, but the direct aid of an advanced optics, of barology, of thermology, of hygrometry ; and if we remember that these delicate observations are in some cases registered electrically, and that they are further corrected for the "personal equation"—the time elapsing between seeing and registering, which varies with different observers—we may even add electricity and psychology. If, then, so apparently simple a thing as ascertaining the position of a star is complicated with so many phenomena, it is clear that this notion of the independence of the sciences, or certain of them, will not hold. Whether objectively independent or not, they cannot be subjectively so—they cannot have independence as presented to our consciousness ; and this is the only kind of independence with which we are concerned. And here, before leaving these illustrations, and especially this last one, let us not omit to notice how clearly they exhibit that increasingly active *consensus* of the sciences which characterizes their advancing development. Besides finding that in these later times a discovery in one science commonly causes progress in others ; besides finding that a great part of the questions with which modern science deals are so mixed as to require the co-operation of many sciences for their solution ; we find in this last case that, to make a single good observation in the purest of the natural sciences, requires the combined assistance of half a dozen other sciences.

Perhaps the clearest comprehension of the interconnected growth of the sciences may be obtained by contemplating that of the arts, to which it is strictly analogous, and with which it is inseparably bound up. Most intelligent persons must have been, at one time or other, struck with the vast array of antecedents presupposed by one of our processes of manufacture. Let him trace the production of a printed cotton, and consider all that is implied by it. There are the

many successive improvements through which the power-looms reached their present perfection; there is the steam-engine that drives them, having its long history from Papin downwards; there are the lathes in which its cylinder was bored, and the string of ancestral lathes from which those lathes proceeded; there is the steam-hammer under which its crank shaft was welded; there are the puddling-furnaces, the blast-furnaces, the coal-mines and the iron-mines needful for producing the raw material; there are the slowly improved appliances by which the factory was built, and lighted, and ventilated; there are the printing engine, and the dyehouse, and the colour-laboratory with its stock of materials from all parts of the world, implying cochineal-culture, logwood-cutting, indigo-growing; there are the implements used by the producers of cotton, the gins by which it is cleaned, the elaborate machines by which it is spun; there are the vessels in which cotton is imported, with the building-slips, the ropeyards, the sail-cloth factories, the anchor-forges, needful for making them; and besides all these directly necessary antecedents, each of them involving many others, there are the institutions which have developed the requisite intelligence, the printing and publishing arrangements which have spread the necessary information, the social organization which has rendered possible such a complex co-operation of agencies. Further analysis would show that the many arts thus concerned in the economical production of a child's frock, have each of them been brought to its present efficiency by slow steps which the other arts have aided; and that from the beginning this reciprocity has been ever on the increase. It needs but on the one hand to consider how utterly impossible it is for the savage, even with ore and coal ready, to produce so simple a thing as an iron hatchet; and then to consider, on the other hand, that it would have been impracticable among ourselves, even a century ago, to raise the tubes of the Britannia bridge from lack of the hydraulic press; to at once see how mutually dependent are the arts, and how all must advance that each may advance. Well, the sciences are involved with each other in just the same manner. They are, in fact, inextricably woven into this same complex web of the arts; and are only conventionally independent of it. Originally the two were one. How to fix the religious festivals; when to sow; how to weigh commodities; and in what manner to measure ground; were the purely practical questions out of which arose astronomy, mechanics, geometry. Since then there has been a perpetual inosculation of the sciences and the arts. Science has been supplying art with truer generalizations and more completely quantitative previsions. Art has been supplying science with better materials, and more perfect instruments. And all along the interdependence has been growing closer, not only between art and science, but among the arts themselves, and among the sciences themselves. How completely the analogy holds throughout, becomes yet clearer when we recognise the fact that *the sciences are arts to each other*. If, as occurs in almost every case, the fact to be analysed by any science, has first to be prepared—to be disentangled from disturbing facts by the afore discovered methods of other sciences; the other sciences so used, stand in the position of arts. If, in solving

a dynamical problem, a parallelogram is drawn, of which the sides and diagonal represent forces, and by putting magnitudes of extension for magnitudes of force a measurable relation is established between quantities not else to be dealt with; it may be fairly said that geometry plays towards mechanics much the same part that the fire of the founder plays towards the metal he is going to cast. If, in analysing the phenomena of the coloured rings surrounding the point of contact between two lenses, a Newton ascertains by calculation the amount of certain interposed spaces, far too minute for actual measurement; he employs the science of number for essentially the same purpose as that for which the watchmaker employs tools. If, before writing down his observation on a star, the astronomer has to separate from it all the errors resulting from atmospheric and optical laws, it is manifest that the refraction-tables, and logarithm-books, and formulæ, which he successively uses, serve him much as retorts, and filters, and cupels serve the assayer who wishes to separate the pure gold from all accompanying ingredients. So close, indeed, is the relationship, that it is impossible to say where science begins and art ends. All the instruments of the natural philosopher are the products of art; the adjusting one of them for use is an art, there is art in making an observation with one of them; it requires art properly, to treat the facts ascertained; nay, even the employing established generalizations to open the way to new generalization, may be considered as art. In each of these cases previously organized knowledge becomes the implement by which new knowledge is got at: and whether that previously organized knowledge is embodied in a tangible apparatus or in a formula, matters not in so far as its essential relation to the new knowledge is concerned. If, as no one will deny, art is applied knowledge, then such portion of a scientific investigation as consists of applied knowledge is art. So that we may even say that as soon as any prevision in science passes out of its originally passive state, and is employed for reaching other previsions, it passes from theory into practice—become science in action—becomes art. And when we thus see how purely conventional is the ordinary distinction, how impossible it is to make any real separation—when we see not only that science and art were originally one; that the arts have perpetually assisted each other; that there has been a constant reciprocation of aid between the sciences and arts; but that the science act as arts to each other, and that the established part of each science becomes an art to the growing part—when we recognise the closeness of these associations, we shall the more clearly perceive that as the connexion of the arts with each other has been ever becoming more intimate; as the help given by sciences to arts and by arts to sciences, has been age by age increasing; so the interdependence of the sciences themselves has been ever growing greater, their mutual relations more involved, their *consensus* more active.

Spencer, Essay on the Genesis of Science. p. 218—224.

APPENDIX 3.

The recognition of Law being the recognition of uniformity of relations among phenomena, it follows that the order in which different groups of phenomena are reduced to law, must depend on the frequency with which the uniform relations they severally display are distinctly experienced. At any given stage of progress, those uniformities will be best known with which men's minds have been oftenest and most strongly impressed. In proportion partly to the number of times a relation has been presented to consciousness (not merely to the senses), and in proportion partly to the vividness with which the terms of the relation have been cognized, will be the degree in which the constancy of connexion is perceived.

The succession in which relations are generalized being thus determined, there result certain derivative principles to which this succession must more immediately and obviously conform. First is *the directness with which personal welfare is affected.* While, among surrounding things, many do not appreciably influence us in any way, some produce pleasures and some pains, in various degrees; and manifestly, those things whose actions on the organism for good or evil are most decided, will, cæteris paribus, be those whose laws of action are earliest observed. Second comes *the conspicuousness of one or both phenomena between which a relation is to be perceived.* On every side are phenomena so concealed as to be detected only by close observation; others not obtrusive enough to attract notice; others which moderately solicit the attention; others so imposing or vivid as to force themselves on consciousness; and, supposing conditions to be the same, these last will of course be among the first to have their relations generalized. In the third place, we have *the absolute frequency with which the relations occur.* There are co-existences and sequences of all degrees of commonness, from those which are ever present to those which are extremely rare; and manifestly, the rare co-existences and sequences, as well as the sequences which are very long in taking place, will not be reduced to law so soon as those which are familiar and rapid. Fourthly has to be added *the relative frequency of occurrence.* Many events and appearances are limited to certain times or certain places, or both; and, as a relation which does not exist within the environment of an observer cannot be perceived by him, however common it may be elsewhere or in another age, we have to take account of the surrounding physical circumstances, as well as of the state of society, of the arts, and of the sciences—all of which affect the frequency

with which certain groups of facts are observable. The fifth corollary to be noticed is, that the succession in which different classes of relations are reduced to law, depends in part on their *simplicity*. Phenomena presenting great composition of causes or conditions, have their essential relations so masked, that it requires accumulated experiences to impress upon consciousness the true connexions of antecedents and consequents they involve. Hence, other things equal, the progress of generalization will be from the simple to the complex; and this it is which M. Comte has wrongly asserted to be the sole regulative principle of the progress. Sixth comes *the degree of abstractness*. Concrete relations are the earliest acquisitions. Such analyses of them as separate the essential connexions from their disguising accompaniments, necessarily come later. The analysis of the connexions, always more or less compound, into their elements then becomes possible. And so on continually, until the highest and most abstract truths have been reached.

Essay on Law in General, p. 83—85.

APPENDIX 3-A.

Having roughly analyzed the progress of the past, let us take advantage of the light thus thrown on the present, and consider what is implied respecting the future.

Note first that the likelihood of the universality of Law has been ever growing greater. Out of the countless co existences and sequences with which mankind are environed, they have been continually transferring some from the group whose order was supposed to be arbitrary, to the group whose order is known to be uniform. And manifestly, as fast as the relations that are unreduced to law become fewer, the probability that among them there are some that do not conform to law, becomes less. To put the argument numerically—It is clear that when out of surrounding phenomena a hundred of several kinds have been found to occur in constant connexions, there arises a slight presumption that all phenomona occur in constant connexions. When uniformity has been established in a thousand cases, more varied in their kinds, the presumption gains strength. And when the known cases of uniformity amount to myriads, including many of each variety, it becomes an ordinary induction that uniformity exists everywhere.

Silently and insensibly their experiences have been pressing men on towards the conclusion thus drawn. No out of a conscious regard for these reasons, but from a habit of thought which these reasons formulate and justify, all minds have been advancing towards a belief in the constancy of surrounding co-existences and sequences. Familiarity with concrete uniformities has generated the abstract conception of uniformity—the idea of *Law*; and this idea has been in successive generations slowly gaining fixity and clearness. Especially has it been thus among those whose knowledge of natural phenomena is the most extensive—men of science. The mathematician, the physicist, the astronomer, the chemist, severally acquainted with the vast accumulations of uniformities established by their predecessors, and themselves daily adding new ones as well as verifying the old, acquire a far stronger faith in law than is ordinarily possessed. With them this faith, ceasing to be merely passive, becomes an active stimulus to inquiry. Wherever there exist phenomena of which the dependence is not yet ascertained, these most cultivated

intellects, impelled by the conviction that here too there is some invariable connexion, proceed to observe, compare, and experiment; and when they discover the law to which the phenomena conform, as they eventually do, their general belief in the universality of law is further strengthened. So overwhelming is the evidence, and such the effect of this discipline, that to the advanced student of nature, the proposition that there are lawless phenomena has become not only incredible but almost inconceivable.

This habitual recognition of law which already distinguishes modern thought from ancient thought, must spread among men at large. The fulfilment of predictions made possible by every new step, and the further command gained of nature's forces, prove to the uninitiated the validity of scientific generalizations and the doctrine they illustrate. Widening education is daily diffusing among the mass of men that knowledge of these generalizations which has been hitherto confined to the few. And as fast as this diffusion goes on, must the belief of the scientific become the belief of the world at large.

That law is universal, will become an irresistible conclusion when it is perceived that *the progress in the discovery of laws itself conforms to law*; and when this perception makes it clear why certain groups of phenomena have been reduced to law, while other groups are still unreduced. When it is seen that the order in which uniformities are recognized, must depend upon the frequency and vividness with which they are repeated in conscious experience; when it is seen that, as a matter of fact, the most common, important, conspicuous, concrete, and simple, uniformities were the earliest recognized, because they were experienced oftenest and most distinctly; it will by implication be seen that long after the great mass of phenomena have been generalized, there must remain phenomena which, from their rareness, or unobtrusiveness, or seeming unimportance, or complexity, or abstractness, are still ungeneralized. Thus will be furnished a solution to a difficulty sometimes raised. When it is asked why the universality of law is not already fully established, there will be the answer that the directions in which it is not yet established are those in which its establishment must necessarily be latest. That state of things which is inferable beforehand, is just the state which we find to exist. If such co-existences and sequences as those of Biology and Sociology are not yet reduced to law, the presumption is not that they are irreducible to law, but that their laws elude our present means of analysis. Having long ago proved uniformity throughout all the lower classes of relations, and having been step by step proving uniformity throughout classes of relations successively

higher and higher, if we have not yet succeeded with the highest classes, it may be fairly concluded that our powers are at fault, rather than that the uniformity does not exist. And unless we make the absurd assumption that the process of generalization, now going on with unexampled rapidity, has reached its limit, and will suddenly cease, we must infer that ultimately mankind will discover a constant order of manifestation even in the most involved and obscure phenomena.

Essay on Law in General, p. 95—98.

APPENDIX 4.

Every art has one first principle, or general major premise, not borrowed from science ; that which enunciates the object aimed at, and affirms it to be a desirable object. The Builder's art assumes that it is desirable to have buildings; Architecture (as one of the fine arts), that it is desirable to have them beautiful or imposing. The hygienic and medical arts assume, the one that the preservation of health, the other that the cure, of disease, are fitting and desirable ends. These are not propositions of science. Propositions of science assert a matter of fact: an existence, a co-existence, a succession, or a resemblance. The propositions now spoken of do not assert that anything is, but enjoin or recommend that something should be. They are a class by themselves. A proposition of which the predicate is expressed by the words *ought* or *should be*, is generically, different from one which is expressed by *is*, *or will be*."

(Art—Encyclopædia Britannica.)

John Stuart Mill in his System of Logic regarding Art says :—It is customary, however, to include under the terms moral knowledge, and even (though improperly) under that of moral science, an inquiry the results of which do not express themselves in the indicative, but in the imperative mood, or in periphrases equivalent to it, what is called the knowledge of duties, practical ethics, or morality.

Now the imperative mood is the characteristic of art, as distinguished from science. Whatever speaks in rules, or precepts, not in assertions respecting matters of fact, is art : and ethics, or morality, is properly a portion of the art corresponding to the sciences of human nature and society.

The method, therefore, of *Ethics*, can be no other than that of Art, or Practice, in general :

In all branches of practical business, there are cases in which individual, is bound to conform his practice to a pre-established rule, while there are others in which it is part of his task to find or construct the rule by which he is to govern his conduct.

Now the reasons of a maxim of policy, or of any other rule of art, can be no other than the theorems of the corresponding science.

The relation in which rules of art stand to doctrines of science may be thus characterized. The art proposes to itself an end to be attained, defines the

end, and hands it over to the science. The science receives it, considers it as a phenomenon or effect to be studied, and having investigated its causes and conditions, sends it back to art with a theorem of the combination of circumstances by which it could be produced. Art then examines these combinations of circumstances, and according as any of them are or are not in human power pronounces the end attainable or not. The only one of the premises, therefore, which Art supplies, is the original major premise, which asserts that the attainment of the given end is desirable. Science then lends to Art the proposition (obtained by a series of inductions or of deductions) that the performance of certain actions will attain the end. From these premises Art concludes that the performance of these actions is desirable and finding it also practicable, converts the theorem into a rule of precept.

It deserves particular notice, that the theorem or speculative truth is not ripe for being turned into a precept, until the whole, and not a part merely, of the operation which belongs to science, has been performed. Suppose that we have completed the scientific process only up to a certain point have discovered that a particular cause will produce the desired effect, but have not ascertained all the negative conditions which are necessary, that is, all the circumstances which, if present, would prevent its production. If in this imperfect state of the scientific theory, we attempted to frame a rule of art, we would perform that operation prematurely. Whenever any counter-acting cause, overlooked by the theorem, takes place, the rule will be at fault : we shall employ the means and the end will not follow. No arguing from or about the rule itself will then help us through the difficulty : there is nothing for it but to turn back and finish the scientific process which should have preceded the formation of the rule. We must re-open the investigation, to inquire into the remainder of the conditions on which the effect depends ; and only after we have ascertained the whole of these, are we prepared to transform the completed law of the effect into a precept, in which those circumstances or combinations of circumstances which the science exhibits as conditions, are prescribed as means.

It is true that, for the sake of convenience, rules must be formed from something less than this ideally perfect theory ; in the first place, because the theory can seldom be made ideally perfect ; and next, because, if all the counteracting contingencies, whether of frequent or of rare occurrence, were included, the rules would be too cumbrous to be apprehended and remembered by ordinary capacities, on the common occasions of life. The rules of art do not attempt to comprise more conditions than require to be attended to in ordinary cases ; and are therefore always imperfect. In the manual arts, where the requisite conditions are not numerous, and where those which the rules do not specify are generally either plain to common observation or speedily learnt from practice, rules may often be safely acted on by persons who know nothing more than the rule. But in the complicated affairs of life, and still more in those of states and societies, rules cannot be relied on, without constantly referring back to the

scientific laws on which they are founded. To know what are the practical contingencies which require a modification of the rule, or which are altogether exceptions to it, is to know what combinations of circumstances would interfere with, or entirely counteract, the consequences of those laws :—and this can only be learnt by a reference to the theoritc grounds of the rule.

By a wise practitioner therefore, rules of conduct will only be considered as provisional. Being made for the most numerous cases, or for those of most ordinary occurrence, they point out the manner in which it will be least perilous to act, where time or means do not exist for analysing the actual circumstances of the case, or where we cannot trust our judgment in estimating them. But they do not at all supersede the propriety of going through (when circumstances permit) the scientific process requisite for framing a rule from the data of the particular case before us. At the same time the common rule may properly serve as an admonition, that a certain mode of action has been found by ourselves and others to be well adopted to the cases of most common occurrence, so that if it be unsuitable to the case in hand, the reason of its being so will be likely to arise from some unusual circumstance. Mills Lagic, pp. 546—50, vol. II, 9th ed.

The grounds, then, of every rule of art, are to be found in the theorems of science. An art or a body of art consists of the rules together with as much of the speculative propositions as comprises the justifications of those rules. The complete art of any matter includes a selection of such a portion from the science, as is necessary to show on what conditions the effect, which the art aims at producing, depends. And art in general consists of the truths of science arranged in the most convenient order for practice, instead of the order which is the most convenient for thought. Science groups and arranges its truth, so as to enable us to take in at one view as much as possible of the general order of the universe. Art, though it must assume the same general laws, follows them only into such of their detailed consequences as have led to the formation of rules of conduct; and brings together from parts of the field of science most remote from one another, the truths relating to the production of the different and heterogeneous conditions necessary to each effect which the exigencies of practical life require to be produced.

Science, therefore, follows one cause to its various effects, while art traces one effect to its multiplied and diversified causes and conditions; there is need of a set of intermediate scientific truths, derived from the higher generalities of science and destined to serve as the generalia or first principles of the various arts.

Mills Logic, pp. 551—52, vol. II, 9th ed.

APPENDIX 4-A.

A science, whether the science of mathematics, or physics, or mechanics, or chemistry, or geology, or physiology, or economics, deals only with the relations of cause and effect within its own field. It assumes nothing to be a good and nothing to be an evil. It does not start with the notion that something is desirable or undesirable, nor does it arrive at any such conclusion as its result. It has no business to offer precepts or prescriptions. Its sole single concern is to trace effects back to their causes, to project causes forward to their effects.

An art on the other hand, starts with the assumption that a certain thing is desirable or that a certain other thing is undesirable; that something is a good or that something is an evil. The object it seeks is to ascertain how the good may be attained, or the evil avoided. In persuing this inquiry, it makes use of the principles, or laws, governing the relations of cause and effect, which have been ascertained in the cultivation of any and all sciences that have in any way to do with its own subject matter. As a result, it issues with certain precepts and prescriptions for the guidance and assistance of those who would gain the good and avoid the evil which that particular art has in contemplation, whether it be the art of navigation, or of cookery, of painting, of gunnery, of architecture, of mining, or of weaving.

(Pol. Ex., by Walker, 3rd edition, p. 19.)

APPENDIX 5.

§ 440. The mere gathering of individuals into a group does not constitute them a society, A society, in the sociological sense, is formed only when, besides Juxtaposition there is co-operation. So long as members of the group do not combine their energies to achieve some common end or ends, there is little to keep them together. They are prevented from separating only when the wants of each are better satisfied by uniting his efforts with those of others, than they would be if he acted alone.

Co-operation, then, is at once that which cannot exist without a society, and that for which a society exists. It may be a joining of many strengths to effect something which the strength of no single man can effect ; or it may be an apportioning of different activities to different persons, who severally participate in the benefits of one another's activities. The motive for acting together, originally the dominant one, may be defence against enemies ; or it may be the easier obtainment of food, by the chase or otherwise ; or it may be, and commonly is, both of these. In any case, however, the units pass from the state of perfect independence to the state of mutual dependence ; and as fast as they do this they become united into a society rightly so called.

But Co-operation implies organization. If acts are to be effectually combined, there must be arrangements under which they are adjusted in their times, amounts, and characters.

§ 441. This social organization, necessary as a means to concerted action, is of two kinds. Though these two kinds generally co-exist, and are more or less interfused, yet they are distinct in their origins and natures. There is a spontaneous co-operation which grows up without thought during the pursuit of private ends ; and there is a co-operation which, conciously devised, implies distinct recognition of public ends. The ways in which the two are respectively established and carried on, present marked contrasts.

Whenever, in a primitive group, there begins that co-operation which is effected by exchange of services—whenever individuals find their wants better satisfied by giving certain products which they can make best, in return for other products they are less skilled in making, or not so well circumstanced for making, there is initiated a kind of organization which then, and throughout its higher stages, results from endeavours to meet personal needs. Division of labour, to the last as at first, grows by experience of mutual facilitations in living. Each new specialization of industry arises from the effort of one who commences it to get profit ; and establishes itself by conducing in some way

to the profit of others. So that there is a kind of concerted action, with an elaborate social organization developed by it, which does not originate in deliberate concert. Though within the small sub-divisions of this organization, we find everywhere repeated the relation of employer and employed, of whom the one directs the actions of the other; yet this relation, spontaneously formed in aid of private ends and continued only at will, is not formed with conscious reference to achievement of public ends: these are not thought of. And though, for regulating trading activities, there arise agencies serving to adjust the supplies of commodities to the demands; yet such agencies do this not by direct stimulations or restraints, but by communicating information which serves to stimulate or restrain; and, further, these agencies grow up not for the avowed purpose of thus regulating, but in the pursuit of gain by individuals. So unintentionally has there arisen the elaborate division of labour by which production and distribution are now carried on, that only in modern days has there come a recognition of the fact that it has all along been arising.

On the other hand, co-operation for a purpose immediately concerning the whole society, is a conscious co-operation; and is carried on by an organization of another kind, formed in a different way. When the primitive group has to defend itself against other groups, its members act together under further stimuli than those constituted by purely personal desires. Even at the outset, before any control by a chief exists, there is the control exercised by the group over its members; each of whom is obliged, by public opinion, to join in the general defence. Very soon the warrior of recognized superiority begins to exercise over each, during war, an influence additional to that exercised by the group; and when his authority becomes established, it greatly furthers combined action. From the begining, therefore, this kind of social co-operation is a conscious co-operation, and a co-operation which is not wholly a matter of choice—is often at variance with private wishes. As the organization initiated by it develops, we see that, in the first place, the fighting division of the society displays in the highest degree these same traits: the grades and divisions constituting an army, co-operate more and more under the regulation, consciously established of agencies which override individual volitions—or, to speak strictly, control individuals by motives which prevent them from acting as they would spontaneously act. In the second place, we see that throughout the society as a whole there spreads a kindred form of organization—kindred in so far that, for the purpose of maintaining the militant body and the government which directs it, there are established over citizens, agencies which force them to labour more or less largely for public ends instead of private ends. And, simultaneously, there develops a further organization, still akin in its fundamental principle, which restrains individual actions in such wise that social safety shall not be endangered by the disorder consequent on unchecked pursuit of personal ends. So that this kind of social organization is distinguished from the other, as arising through concious pursuit of public ends; in furtherance of which individual

wills are constrained, first by the joint wills of the entire group, and afterwards more definitely by the will of a regulative agency which the group evolves.

Most clearly shall we perceive the contrast between these two kinds of organization on observing that, while they are both instrumental to social welfare, they are instrumental in converse ways. That organization shown us by the division of labour for industrial purposes, exhibits combined action ; but it is a combined action which directly seeks and subserves the welfares of individuals, and indirectly subserves the welfare of society as a whole by preserving individuals. Conversely, that organization evolved for governmental and defensive purposes, exhibits combined action ; but it is a combined action which directly seeks and subserves the welfare of the society as a whole, and indirectly subserves the welfares of individuals by protecting the society. Efforts for self-preservation by the units originate the one form of organization ; while efforts for self-preservation by the agregate originate the other form of organization. In the first case there is conscious pursuit of private ends only ; and the correlative organization resulting from this pursuit of private ends, growing up unconsciously, is without coercive power. In the second case there is conscious pursuit of public ends ; and the correlative organization, consciously established, exercises coercion.

Of these two kinds of co-operation and the structures effecting them, we are here concerned only with one. Political organization is to be understood as that part of social organization which consciously carries on directive and restraining functions for public ends. It is true, as already hinted, and as we shall see presently, that the two kinds are mingled in various ways - that each ramifies through the other more or less according to their respective degrees of predominance. But they are essentially different in origin and nature ; and for the present we must, so far as may be, limit our attention to the last.

Political Institution, Chap. 2 — p. 244—248.

APPENDIX 6.

Besides the various sorts of rules which are included in the literal acceptation of the term law, and those which are by a close and striking analogy, though improperly, termed laws, there are numerous, applications of the term law, which rest upon a slender analogy and are merely metaphorical or figurative. Such is the case when we talk of *laws* observed by the lower animals; of *laws* regulating the growth or decay of vegetables; of *laws* determing the movements of inanimate bodies or masses. For where *intelligence* is not, or where it is too bounded to take the name of *reason*, and, therefore, is too bounded to conceive the purpose of a law, there is not the *will* which law can work on, or which duty can incite or restrain. Yet through these misapplications of a *name*, flagrant as the metaphor is, has the field of jurisprudence and morals been deluged with mudy speculation.

Austin, p 90. 4th ed.

APPENDIX 6-A.

But if the English abstract term 'Law' is free from any suggestion of the aggregate of Rights, or of the aggregate of just things, it is of course suggestive of all the meanings in which the concrete term 'a law' is employed in our language; and these have unfortunately been so numerous as to involve the abstract idea in considerable obscurity. Hence it is that so many of the definitions which have been given of that mysterious non-entity strike us as being vague or merely eulogistic. Many of them have reference to that divine order which pervades the inanimate universe even more than the actions of rational beings; and those of them which have reference to human action deal quite as often with the voluntarily observed maxims of society as with rules which are supported by the authority of the State.

Heterogeneous however as the senses of the term 'a law' may at first sight appear, the connection between them is not hard to trace; nor is the earliest use widely different from the latest and most accurate.

The shepherd who guides his flock, or, on a larger scale, the head of a family who regulates its encampments and employments, seems to have been the earliest 'lawgiver,' and his directions, as orders given by one who has power to enforce their observance, are the earliest 'laws.' The original, and still the popular, conception of a 'law,' is a command prescribing a course of action, disobedience to which will be punished. In this conception there is of course implied that of a lawgiver, who has power to enforce his commands *. From this vague original use of the term has arisen that large development of uses, some proper, some merely metaphorical, out of which the jurist has to select that which he admits into his science.

The strongest intellectual tendency of mankind is the anthropomorphic. If man is a mystery to himself, external nature is a still greater mystery to him, and he explains the more by the less obscure. As he governs his flock and his family, so he supposes that unseen beings govern the waters and the winds. The greater the regularity which he observes in nature, the fewer such beings does he suppose to be at work in her; till at length he rises to the conception of one great being whose laws are obeyed by the whole universe; or it may be that, having thus arrived at the notion of a universe moving according to law,

* Max Muller appears to think that, among the Hindoos at all events, the order of ideas was the converse, showing that in the Vedic Hymns, *Rita*, from meaning the order of the heavenly movements, became in time the name for moral order and righteousness. Hibbert Lectures, 1878, p. 235.

he holds fast to it, even while he loses his hold on the idea of the existence of a supreme lawgiver.

Men have also almost always believed themselves to be acquainted with certain rules intended for the guidance of their actions, and either directly revealed to them by a superhuman power, or gathered by themselves from such indications of the will of that power as are accessible. They have supposed that they have discovered by self-analysis a master part of themselves, to the dictates of which they owe allegiance. They have observed that, in order that their senses may receive certain impressions from external objects, those objects must be arranged in certain ways, and no other.

It is easy enough, upon consideration of these facts, to account for the existence of such phrases as laws of Nature, laws of God, laws of Morality, laws of Beauty, and others which will at once suggest themselves.

The employment of the same name to denote things to different may appear to us to imply an extraordinary confusion of the topics appropriate to Theology, to Physics, to Ethics, to Æsthetics, and to Jurisprudence; but the wonder will be less if we remember that the separation of the sciences to which we are accustomed, and which we take for granted, was unknown to remote antiquity. The world with all its varied phenomena was originally studied as a whole The facts of nature and the doings of man were alike conceived of as ordained by the gods. The constitutions of states and the customs and laws of all the peoples of the earth were as much of divine contrivance as the paths of the planets. The great problem thus presented for the study of mankind was gradually broken up into a number of minor problems. There occurred a division of the sciences. A line was drawn between those which deal with external nature, including Theology and Metaphysics, and those which deal with the actions of men. These latter, the practical, were thus severed from the theoretical sciences *; and the term law, which had been used ambiguously in the discussion of both sets of topics before their severance, has henceforth two distinct histories. In the theoretical sciences, it is used as the abstract idea of the observed relations of phenomena, be those relations instances of causation or of mere succession and co-existence. In the practical sciences the term is used to express the abstract idea of the rules which regulate human action.

In the theoretical, or as we should rather say in modern phrase, in the physical sciences, Law is used to denote the method of the phenomena of the universe; a use which would imply, in accordance with the primitive meaning of the term, that this method is imposed upon the phenomena either by the will of God, or by an abstraction called Nature.

---

* They are henceforth connected only by means of religion, and by speculations concerning the faculties of the human mind.

This use of the term may certainly lead to misconceptions. It has long ago been agreed that all we can know of natural phenomena is that they co-exist with, or succeed, one another in a certain order, but whether this order be imposed immediately by a divine will, or mediately through an abstraction called Nature, or through minor abstractions called Gravitation, Electricity, and the like, the phenomena themselves are unable to inform us. It is therefore necessary to realise that when we talk of the laws of Gravity or of Refraction, we mean merely that objects do gravitate and that rays are refracted. We are using the term law merely to convey to our minds the idea of order and method, and we must beware of importing into this idea any of the associations called up by the term when it is employed in the practical sciences.

Its use in these sciences is, speaking very generally, to express a rule of human action; and the sciences of human action being those in which the term is most used, and indeed is most needed, it is reasonable to say that this is its proper meaning, and that its use in the theoretical sciences is improper, or metaphorical merely.

But just as its metaphorical use, as meaning 'order,' is sometimes obscured by associations derived from its proper use as signifying 'a rule,' so is its proper use as 'a rule' occasionally confused by an imagined parity between a rule and the invariable order of nature.

The first step therefore towards clearing the term Law of ambiguity for the purposes of Jurisprudence is to discard the meaning in which it is employed in the physical sciences, where it is used, by a mere metaphor, to express the method or order of phenomena, and to adopt as its proper meaning that which it bears in the practical sciences, where it is employed as the abstract of rules of human action.

Jurisprudence.—Holland, p. 14-18.

APPENDIX 6-B.

The nature and extent of the analogy between laws in the strict or political sense, and the uniformities in the course of physical events which we call laws of nature, have often been discussed. Blackstone and earlier writers pressed the comparison with rhetorical inexactness, which has been rebuked by the later analytical school with some excess of severity, as if the likeness were merely verbal and misleading. Early in this century the correction was more modestly but not less effectually made by Blackstone's editor Christian. "In all cases," he says, "where it" (the words law) "is not applied to human conduct, it may be considered as a metaphor; and in every instance a more appropriate term may be found.....When we apply the word *law* to motion, matter, or the works of nature or of art, we shall find in every case that, with equal or greater propriety and perspicuity, we might have used the words *quality*, *property*, or peculiarity" Still the resemblance, notwithstanding all criticism, is a real one. The laws made by princes and rulers aim with more or less success, though never with perfect success, at producing uniformity of conduct within the field of action to which this apply. We observe in the course of nature uniformities which are constant. This constancy, compared with the partial and uncertain obedience given to human ordinances, has in all times presented itself to men as the perfect fulfilment in another region of that which the law-giver can only strive to attain. By laws we can, more or less, make men behave in particular ways; the constraints of express enactment or customary rules are sufficient to some extent, but not altogether, to determine their acts and forbearances. But the powers of nature always behave in the same ways, and this readily suggests to our mind a constraint which is always present and always efficient. Seed-time and harvest, the changes of the moon, the courses of the stars, come round without fail. Thus it would be with men's actions if the law were always obeyed, and therefore we seem to see in nature a low more perfect than mine's because never broken. In some such way as this the phrase "laws of nature" has come into common use, and in the practice of modern writers almost any general proposition in any branch of science may called a law. That this manner of speaking should came to be regarded as containing an explanation of the facts is but one of inumerable instances of the tyranny constantly usurped over man by his own creatures—words. But in following this track of resemblance we have introduced unawares an important difference. At first sight the laws of a nature seem to differ from those of man only in being inviolate; and their excellance in this respect is indeed a not uncommon topic of natural theology. But, when we consider it more curiously, the distinction is one of kind. The laws of nature are not more excellent than Acts of Parliament, but

belong to another category. Christian has expressed the point as well as anybody : 'When *law* is applied to any other object than man, it ceases to contain two of its essential ingredient ideas – namely, disobedience and punishment." A law of nature is obeyed, as we say, because there is no room for disobedience. In the case of laws in the proper sense, the law is one thing and the obedience – or, as it may be, disobedience – of any man subject to it is another thing : in the case of a law of nature there is no such difference. Human statutes, and even divine ones according to the majority of theologians, are commands addressed to agents who may or may not follow them. Their object is a certain uniformity, but the uniformity does not necessarily ensue. Nay, the law would still be a law if no single person obeyed it on any one occasion. But a law of nature is inseparable from uniformity ; or rather it is the uniformity itself.

These considerations are such as by this time are pretty familiar to students of jurisprudence. Men of science have hitherto not troubled themselves much with the question, or at any rate have not added anything to the legal view of it As to the attempts of philosophers who were neither men of science nor lawyers to clear up the general notion of law, they are best left in charitable silence. But lately Professor Huxley, in his admirable introduction to Messrs Macmillan & Co.'s series of *Science Primers*,* has brought a fresh and powerful scientific mind to bear upon this ancient comparison or metaphor, and shown once more that no subject is too worn to be put in some new light. His paragraph on "Laws of Nature" is quite short, and a considerable part of it may be given in his own words.

When we have made out by careful and repeated observation, that something is always the cause of certain effect, or that certain events always take place in the same order, we speak of the truth thus discovered as a law of nature. Thus it is a law of nature that anything heavy falls to the ground if it is supported. .....But it is desirable to remember that which is very often forgotten, that the laws of nature are not the causes of the order of nature, but only our way of stating as much as we have made out of that order. Stones do not fall to the ground in consequence of the law just stated, as people sometimes carelessly say ; but the law is a way of asserting that which invariably happens when heavy bodies at the surface of the earth, stones among the rest, are free to move.

The laws of nature are, in fact, in this respect similar to the laws which men make for the guidance of their conduct towards one another. There are laws about the payment of taxes, and there are laws against stealing or murder. But the law is not the cause of a man's paying his taxes, nor is it the cause of his abstaining from theft or murder. The law is simply a statement of what will happen to a man if he does not pay his taxes, and if he commits theft or murder ; and the cause of

* The little of the book is *Science Primers : Introductory*, which is an awkward one to quote.

his paying his taxes or abstaining from crime (in the absence of any better motive) is the fear of consequences which is the effect of his belief in that statement. A law of man tells [us] what we may expect society will do under certain circumstances; and a law of nature tells us what we may expect natural expect objects will do under certain circumstances. Each contains information addressed to our intelligence, and, except so far as it influences our intelligence, it is merely so much sound or writing.

While there is this much analogy between human and natural laws, however, certain essential differences between the two must not be overlooked. Human law consists of commands addressed to voluntary agents, which they may obey or disobey; and the law is not rendered null and void by being broken. Natural laws, on the other hand, are not commands, but assertions respecting the invariable order of nature; and they remain laws only so long as they can be shown to express that order. To speak of the violation or the suspension of a law of nature is an absurdity. All that the phrase can really mean is that, under certain circumstances, the assertion contained in the law is not true; and the just conclusion is, not that the order of nature is interrupted, but that we have made a mistake in stating that order. A true natural law is an universal rule, and, as such, admits of no exceptions.

Professor Huxley, it will be seen, fully recognizes the difference insisted upon by Bentham and his followers in this country; and on that point we do not see how his exposition can be bettered. We can only rejoice that truths which down to our own time were ignored or imperfectly apprehended by the majority of learned men are now presented in clear, simple, and forcible language to every one who sets about acquiring even the rudiments of scientific training. There is some novelty, however, in the similarity between natural and political or civil laws, which is pointed out in the middle section of the passage we have quoted; and we may find here some matter for further reflection. Professor Huxley assigns uniformity of action as the common element in our conception of laws proper and of the so-called laws of nature, but he assigns the uniformity of law properly so-called to an unaccustomed place. He refers our impression of uniformity not to the effect of laws in so far as they are observed, but to that which happens if they are broken. Not in the action of the citizen who obeys, but in the action of the state which punishes the disobedient, we are to perceive the analogy to the certain and constant operations of nature. This is not only enginous, but seems to fall in very well with the doctrine of our analytical school, which, as all student know, lays peculiar stress on the sanctions of positive law. Moreover, there is a considerable show of convenience for it. There is in any case no perfect uniformity to be discovered in human positive law. But on the common view the exceptional cases will be all cases of disobedience; on Professor Huxley's view they will be only those cases of disobedience which escape punishment. And thus there is a decided gain in the apparent closeness of the anology.

But we have to consider how for it can be rightly said that "the law is simply a statement of what will happen to a man" if he disobeys it. And it is to be observed in the first place that, however true this may be for the analytical inquirer, it is not the manner in which the law is actually regarded for any practical purpose ; except, perhaps, criminal law, which is not safely to be taken as the type of positive law in general. Honest men want, as a rule, to know enough of the law to conform to it in their dealings ; but, inasmuch as they have no entention of breaking it, do not want to know the exact consequences of a breach. Hence the historical account of the comparison which would be required by Professor Huxley's explanation seems less probable than that which we have given above. Further, the "statemont of what will happen" is by no means a simple one, for its truth depends on several conditions. The sanction will take effect if the wrong and the wrongdoer are discovered, and if there is no miscarriage in any part of the proceedings, and if the law is honestly administered. And all these conditions are, or may be, material : the last of them, happily, need not be considered in England ; but there are many countries where it is otherwise. In the last year or two we have been repeatedly told that many wholesome laws or nominally in force in Asia Minor, which only need to be put in real use make the condition of the people, if not the best that might be, at least much better than it is. But then these laws are not statements of what will happen : they are statements of what does not happen, and was never seriously expected to happen by persons who knew the secrets of Turkish Government. In the southern provinces of Russia the law presumably forbids Russians of the orthadox greek persuasion to plunder, ravish, and murder their felow-subjects, and not the less so that the sufferers may happen to be Jews. Yet the people of several Russian towns aad villages have been doing all these things openly, as we hear, to their jewcsh felow subjects ; and we do not hear that the criminals have been punished, or that any serious endeavour has been made to punish them. I no ur own country there have been many penal statutes which were not in any natural sense statements of what would happen to persons contravening them ; for they have been habitually neglected and contravened to this day, and nothing whatever has happened to the transgressors. This is true even of some modern and apparently rational enactments, such as that against the conveyance of woters in boroughs. Again, it seems for-fetched to heighten the analogy between laws proper and laws of nature by saying that "the law is not the case of a man's paying his taxes." Surely it is at least *causa sine qua non*, for without it why should he pay them, or how could there be taxes to pay ? To take a concrete instance, it seems not easy to deny that the Elementary Education Act—that is, the will of Parliament as expressed by the Act—is the cause of school boards being elected and of householders paying school rates.

No doubt law, so far as it takes effect by reason of its sanction, is effectual through the belief of the subject addressed that the threatened evil will follow in case of disobedience. But the belief or assertion that the threatened

evil will follow is not the law itself: it is an inference from the law taken with circumstances. In itself, the law is, from the assumed point of view, a command coupled with a threat. The probability that the rulers issuing it will make their threat good—which may depend on their power, or on their will, or both must be ascertained by other means of information. Strictly the law tells us only what the State professes that it will do; and in well-governed commonwealths this will coincide, saving inevitable accidents, with "what we may expect society will do." But the two things are not identical. On the ground taken by Professor Huxley, the nearest counterpart to a law of natnre in the scientific sense would seem to be, not the enactment or decree of a sovereign power in itself, but a statement of its contents (say in a collection of statutes, or in an exposition by a tax writer), coupled with the tacit assumption that the law can and will be enforced. Again, the amount of uniformity which is actually presented by the working of human laws depends in great measure on something not immediately connected either with the character of those laws as commands, or with the punishments denounced on men who disobey them. We mean the following of precedent. This is a mark of law which is perhaps as important as any.

We should hardly give the name of law to a series of unrelated and inconsistent commands enforced by arbitrary and uncertain methods, although their subject matter might be the same as that of the kind of laws we are used to. The capricious orders of a crazy despot may be laws according to Austin's definition until they are revoked; but if so, it is the worse for the definition. In any case the law of civilized countries, as we now find it, is to a great extent founded on precedent. In the English system, which prevails, with few exceptions, throughout the British Dominions and the United States, the precedents are furnished by the recorded decisions of Judges on questions which have occured in actual litigation. In the system of the Roman Law, which prevails on the Continent of Europe and in the settlements and possession of Continental Powers, the precedents consist of the opinions of distinguished lawyers and text-writers on questions which may or may not have come before them in a practical way; to which, according to the modern practice of several countries, Judicial decisions are added, but not so as to have any greater authority than the best opinions. The differences between the two systems are important; but at present we are not concerned to pursue them. They agree, however, in this, that they look for guidance in new difficulties to the treatment of similar difficulties in past times. The manner and degree of their observance of precedent are diverse; the general character is the same. And it is an observance also largely met with in those parts of the conduct of life which have a formal and quasi-legal character, such as the proceedings of legislative and executive bodies, public meetings, and committees. Of actual ceremonies we say nothing, as their history is distinct. In modern times they have mostly become parts of same order or discipline which is directly or indirectly under the sanction of positive law; and then the necessity of

observing them is for the persons concerned simply the necessity of obeying the law. But ceremonies are doubtless earliar than any laws, and the influence of ceremonial ideas and habits on ancient law is a subject of which the importance is already apparent, and on which there is probably still much to be learnt. So long and in so far as ceremonies exist independently of law, their safeguard is the supposed necessity of performing them exactly at all points in order to obtain a desired benefit or avert a dreaded misfortune.

Essays in Jurisprudence and Ethics by Frederick Pollock, M. A., p. 42 to 52.

APPENDIX 6-C.

Now, turning back to the consideration of what are called laws of nature, we may observe that nature presents to us, even more than the image of command always obeyed, that of precedent invariably followed. The analogy to human laws in their modern or statutory sense, as express commands prescribing particular things to be done, is the product of a rather advanced stage of reflection. Whatever its value may be (and I am free to confess that I do not rate it highly), it is artificial. The analogy to human law in its ancient or customary form is both closer and more obvious. And to early observes the uniformity of nature, so far as it was ascertainable with their means of observation, would in on way seems to be in contrast with human conduct, such as it was or ought to have been according to the standards of conduct they were familiar with, but would rather offer a singular harmony with it. Anthropomorphic interpretations of the common phenomena of nature would seem not less but more probable by reason of the phenomena being periodic and fairly constant. The works of man's hands wait upon the seasons of the year, and are fulfilled with their due and accustomed ceremonies; and man, looking out from himself into the world, finds custom and solemnity in the world and the seasons themselves, and carries them into his early speculations or the unseen rulers of the world. Whoever reads Homer with his eyes open will find that the Gods on Olympus are ruled by custom and prescription almost as much as the host of the Achaians before Troy Zeus is the father and master of the house; his might is boundless, or almost boundless; but there are bonds which even he must not break. It is not that the power fails him. He is tempted to break the fate of his son Sarpedon, but he is restrained by Hera's rebuke. The deed might be done, but would be lawless and of dangerous example. And as they are capable of communion and kindred with mortals, the Gods also have their share in men's custom and law. Poseidon takes up the feud of his son Polyphemus against Adysseus, and as between the Gods themselves Ares owes the adulterer's fine, or rather ransom, to Hephaistos, and is released only when Poseidon becomes surety for him. They are the protectors of human justice, too, and Zeus sends the great rain-floods in, his wrath when men of violence sit in the marketplace and judge crooked judgment, not regarding the word of the Gods.* But they are not the

* II, XVI, 386.

authors of justice and law ; the rules guarded by their power are their laws only in the same sense as in the theory of English legal writers, the immemorial common law which the King's Courts administer is the King's law. To a Greek mind in the Homericage, and probably much latter, the reign of law was the same, or nearly the same, in nature and in man. On the one hand the course of nature was transfigured by anthropomorphic imagination ; on the other hand the freedom of human action itself was but slight in comparison with the bond of custom and the universal constraint of fate, beyond the Gods themselves, which formed the mysterious background of the universe. The clear separation of the laws of nature from the laws of man was reserved for a time when many more generations had received the discipline of science and philosophy. We who are in possession of the modern analysis shall do much amiss if, like some of its expounders, we despise our fathers for not having known better.

Essays in Jurisprudence and Ethis by Fredrick Pollock—p. 57 to 59.

APPENDIX 6-D.

The word 'law' has come down to us in close association with two notions, the notion of *order* and the notion of *force*. The association is of considerable antiquity and is disclosed by a considerable variety of languages, and the problem has repeatedly suggested itself, which of the two notions thus linked together is entitled to precedence over the other, which of them is first in point of mental conception! The answer, before the Analytical Jurists wrote, would on the whole have been that 'law' before all things implied order. 'Law' in its most general and comprehensive sense signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics or mechanics, as well as the laws of nature and of notions. With these words Blackstone begins that Chapter on 'the Nature of Laws in General,' which may almost be said to have made Bentham and Austin into Jurists by virtue of sheer repulsion. The Analytical Jurists, on the other hand, lay down unhesitatingly that the notion of force has priority over the notion of order. They say that a true law, the command of an irresistible Sovereign, enjoins a class of acts or a class of omissions either on a subject or a number of subjects, placed by the command alike and indifferently under a legal obligation. The characteristic which thus as a matter of fact attaches to most true laws of binding a number of persons, taken indifferently, to a number of acts or omissions, determined generally, has caused the term 'law' to be extendedly by metaphor to all uniformities or invariable successions in the physical world, in the operation of the mind, or in the actions of mankind. Law when used in such expressions as the Law of Gravity, the Law of Mental Association, or the Law of Rent is treated by the Analytical Jurists, as a word wrested from its true meaning by an inaccurate figurative extention, and the sort of disrespect with which they speak of it is extremely remarkable. But I suppose that, if dignity and importance can properly be attributed to a word, there are in our day few words more more dignified and more important than law, in the sense of the invariable succession of phenomena, physical, mental, or even politico—economical. With this meaning, 'law' enters into a great deal of modern thought, and has almost become the condition of its being carried on. It is difficult at first to believe that such

an expression as 'the Reign of law,' in the sense in which the words have been popularised by the Duke of Argyll's book, would have been strongly disliked, by Austin; but his language leaves little doubt on the point, and more than once reminds us that, though his principal writings are not much more than forty years old, he wrote before men's ideas were leavened to the present depth by the sciences of experiment and observation.

The Early History of Institutions by Maine—pp. 370 to 373.

APPENDIX 6-E.

1460—Laws of Nature and Laws of the State—The analogy between political laws, the laws which speak the will of the state, and natural laws, the laws which express the orderly succession of events in nature, has often been dwelt upon, and is not without instructive significance. In the one set of laws as in the other, there is, it would seem, a misform prescription as to the operation of the forces that make for life. The analogy is most instructive, however, where it fails : it is more instructive, that is, to note the contrasts between the laws of nature and laws of the state than to note such likeness as exists between them. The contrasts rather than the resemblances serve to make evident the real nature of political regulation. "Whenever we have made out by careful and repeated observation," says Professor Huxley, "that something is always the cause of certain effect, or that certain events always take place in the same order, we speak of the truth thus discovered as a law of nature. Thus it is a law of nature that anything heavy falls to the ground if it is unsupported.....But the laws of nature are not the causes of the order of nature, but only our way of stating as much as we have made out of that order. Stones do not fall to the ground in consequence of the law just stated, as peoples sometimes carelessly say ; but the law is a way asserting that which invariably happens when heavy bodies at the surface of the earth, stones among the rest, are free to move." Whatever analogies may exist between such generalised statements of physical fact and the rules in accordance with which men are constrained to act in organized civil society may be profitable for the curious carefully to inquire into. What it is most profitable for the student of politics to observe is the wide difference between the two which Professor Huxley very admirable states as follows : "Human Law consists of commands addressed to voluntary agents, which they may obey or disobey ; and the law is not rendered null and void by being broken. Natural laws, on the other hand, are not commands, but assertions respecting the invariable order of nature ; and they remain law only so long as they can be shown to express that order. To speak of the violation or suspension of a law of nature is an absurdity. All that the phrase can really mean is that, under certain circumstances, the assertion contained in the law is not true ; and the just conclusion is, not that order of nature is interrupted, but that we have made a mistake in stating that order. A true natural law is a universal rule, and, as such, admits of no exception."* In brief, human choice enters into the law of the state, whereas from natural law that choice is altogether excluded ;

* These passages are taken from Professor Huxley's Science Primer Introductory.

it is dominated by fixed necessity. Human choice, indeed, enters every part of political law to modify it. It is the element of change; and it has given to the growth of law a variety, a variability, and an irregularity which no other power could have imparted.

1461—*Limitations of Political Law.*—We have thus laid bare to our view some of the most instructive characteristics of political law. The laws of nature formulate effects invariably produced by forces of course adequate to produce them; but behind political laws there is not always a force adequate to produce the effects which they are designed to produce. The force, the *sanction*, as jurists say, which lies behind the laws of state is the organized armed power of the community: compulsion raises its arm against the man who refuses to obey, (secs. 1387, 1440). But the public power may sleep, may be inattentive to breaches of law may suffer itself to be bribed, may be outwitted or thwarted: laws are not always 'enforced'! This element of weakness it is which opens up to us one aspect at least of the nature of Law. Law is no more efficient than the state whose will it utters. The law of Turkey shares all the imperfections of the Turkish power; the laws of England be speak in their enforcement the efficacy of English Government. Good laws are of no avail under a bad Government; a weak, decadent state may speak the highest purposes in its statutes and yet do the worst things in its actual administration. Commonly, however, law embodies the real purposes of the state, and its enforcement is a matter of administrative capacity or of concerted power simply.

(The State by Woodrow Wilson, p. 606—7.)

APPENDIX 7.

It is needful to define the words *abstract* and *concrete* as thus used; since they are sometimes used with other meanings. M. Comte devides Science into abstract and concrete; but the divisions which he distinguishes by these names are quite unlike those above made. Instead of regarding some Sciences as wholly abstract, and others as wholly concrete, he regards each Science as having an abstract part, and a concrete part. There is, according to him, an abstract mathemathics and a concrete mathematics—an abstract biology and concrete biology. He says:—"Il faut distinguer, par rapport a tous les ordres de phenomenes, deux genres de sciences naturelles: les unes abstraites, generales, ont pour objet la decouverte des lois qui regissent les diverses classes de phenomenes, en considerant tous les cas qu'on peut concevior; les autres concretes, particulieres, descriptives, et qu'on designe quelquefois sous le nom de scienoes naturelles proprement dites, consistent dans l'application de ces lois a l'histoire effective de differens etres existans." And to illustrate the distinction, he names general physiology as abstract, and zoology and botany as concrete. Here it is manifest that the words *abstract* and *general* are used as synonymous. They have, however, different meanings; and confusion results from not distinguishing their meanings. Abstractness means *detachment from* the incidents of particular cases. Generality means *manifestation in* numerous cases. On the one hand, the essential nature of some phenomenon is considered, apart from disguising phenomena. On the other hand, the frequancy of the phenomenon, with or without disguising phenomena, is the thing considered. Among the ideal relations of numbers the two coincide; but excluding these, an abstract truth is not realizable to perception in any case of which it is asserted, whereas a general truth is realizable to perception in every case of which it is asserted. Some illustrations will make the distinction clear. Thus it is an abstract truth that the angle contained in a semi-circle is a right angle—abstract in the sense that though it does not hold in actually-constructed semi-circles and angels, which are always inexact, it holds in the ideal semi-circles and angles abstracted from real ones; but this is not a general truth, either in the sense that it is commonly manifested in Nature, or in the sense that it is a space-relation that comprehends many minor space-relations: it is a quite special space-relation. Again, that the momentum of a body causes it to move in a straight line at a uniform velocity, is an abstract-concrete truth—a truth abstracted from certain experiences of concrete phenomena; but it is by no means a general truth: so little generality has it, that no one fact in Nature displays it. Conversely, surrounding things supply us with hosts of general truths that are not in the least abstract. It is a general truth that the planets go round the Sun from

West to East—a truth which holds good in something like a hundred cases (including the cases of the planetoids); but this truth is not at all abstract, since it is perfectly realized as a concrete fact in every one of these cases. Every vertebrate animal whatever, has a double nervous system; all birds and all mammals are warm-blooded—these are general truths, but they are concrete truths: that is to say, every vertebrate animal individually presents an entire and unqualified manifestation of this duality of the nervous system; every living bird examplifies absolutely or completely the warm-bloodedness of birds. What we here call, and rightly call, a general truth, is simply a proposition which *sums up* a number of our actual experiences; and not the expression of a truth *drawn from* our actual experiences, but never presented to us in any of them. In other words, a general truth colligates a number of particular truths; while an abstract truth colligates no particular truths, but formulates a truth which certain phenomena all involve, though it is actually seen in none of them.

Essays, Spencer, Vol. III.—pp. 12 to 15.

APPENDIX 8.

§ 104. And now we are prepared for dealing in a systematic way with the distinction between Absolute Ethics and Relative Ethics.

Scientific truths, of whatever order, are reached by eliminating perturbing or conflicting factors, and recognizing only fundamental factors. When, by dealing with fundamental factors in the abstract, not as presented in actual phenomena but as presented in ideal separation, general laws have been ascertained, it becomes possible to draw inferences in concrete cases by taking into account incidental factors. But it is only by first ignoring these and recognizing the essential element alone, that we can discover the essential truths sought. Take, in illustration, the progress of mechanics from its empirical form to its rational form.

All have occasional experience of the fact that a person pushed on one side beyond a certain degree, loses his balance and falls. It is observed that a stone flung or an arrow shot, does not proceed in a straight line, but comes to the earth after pursuing a course which deviates more and more from its original course. When trying to break a stick across the knee, it is found that success is easier if the stick is seized at considerable distances from the knee on each side than if seized close to the knee. Daily use of a spear drawn attention to the truth that by thrusting its point under a stone and depressing the shaft; the stone may be raised the more readily the further away the hand is towards the end. Here, then, are sundry experiences, eventually grouped into empirical generalizations, which serve to guide conduct in certain simple cases. How does mechanical science evolve from these experiences? To reach a formula expressing the powers of the lever, it supposes a lever which does not, like the stick, admit of being bent, but is absolutely rigid; and it supposes a fulcrum not having a broad surface, like that of one ordinarily used, but a fulcrum without breath; and it supposes that the weight to be raised bears on a definite point, instead of bearing over a considerable portion of the lever. Similarly with the leaning body, which, passing a certain inclination, overbalances. Before the truth respecting the relations of centre of gravity and base can be formulated, it must be assumed that the surface on which the body stands is unyielding; that the edge of the body itself is unyielding; and that its mass, while made to lean more and more, does not change its form—conditions not fulfilled in the cases commonly observed. And so, too, is it with the projectile: determination of its course by deduction from mechanical laws, primarily ignores all deviations caused by its shape and by the resistance of the air. The science of rational mechanics is a science which consists of such ideal truths, and can come into existence only by thus dealing with ideal cases. It remains impossible so long as attention is

restricted to concrete cases presenting all the complications of friction, plasticity and so forth. But now, after disentangling certain fundamental mechanical truths, it becomes possible by their help to guide actions better ; and it becomes possible to guide them still better when, as presently happens, the complicating elements from which they have been disentangled are themselves taken into account At an advanced stage, the modifying effects of friction are allowed for, and the inferences are qualified to the requisite extent. The theory of the pulley is corrected in its application to actual cases by recognizing the rigidity of cordage ; the effects of which are formulated. The stabilities of masses, determinable in the abstract by reference to the centres of gravity of the masses in relation to the bases, come to be determined in the concrete by including also their characters in respect of cohesion. The courses of projectiles having been theoretically settled as though they moved through a vacuum, are afterwards settled in more exact correspondence with fact by taking into account atmospheric resistance. And thus we see illustrated the relation between certain absolute truths of mechanical science, and certain relative truths which involve them. We are shown that no scientific establishment of relative truths is possible, until the absolute truths have been formulated independently. We see that mechanical science fitted for dealing with the real, can arise only after ideal mechanical science has arisen.

All this holds of moral science As by early and rude experiences there were inductively reached, vague but partially-true notions respecting the overbalancing of bodies, the motions of missiles, the actions of levers ; so by early and rude experiences there were inductively reached, vague but partially-true notions respecting the effects of men's behaviour on themselves, on one another, and on society : to a certain extent serving in the last case, as in the first, for the guidance of conduct. Moreover, as this rudimentary mechanical knowledge, though still remaining empirical, becomes during early stages of civilization at once more extensive ; so during early stages of civilization these ethical ideas, still retaining their empirical character, increase in precision and multiplicity. But just as we have seen that mechanical knowledge of the empirical sort can evolve into mechanical science, only by first omitting all qualifying circumstances, and generalizing in absolute ways the fundamental laws of forces ; so here we have to see that empirical ethics can evolve into rational ethics only by first neglecting all complicating incidents, and formulating the laws of right action apart from the obscuring effects of special conditions. And the final implication is that just as the system of mechanical truths, conceived in ideal separation as absolute, becomes applicable to real mechanical problems in such way that making allowance for all incidental circumstances there can be reached conclusions far nearer to the truth than could otherwise be reached ; so, a system of ideal ethical truths, expressing the absolutely right, will be applicable to the questions of our transitional state in such ways that, allowing for the friction of an incomplete life and the imperfection of existing natures, we may ascertain with approximate correctness what is the relative right.

§ 105. In a chapter entitled "Definition of Morality" in *Social Statics*, I contended that the moral law, properly so-called, is the law of the perfect man—is the formula of ideal conduct—is the statement in all cases of that which should be, and cannot recognize in its propositions any elements implying existence of that which should not be. Instancing questions concerning the right course to be taken in cases where long has already been done, I alleged that the answers to such questions cannot be given "on purely ethical principles." I argued that—

"No conclusions can lay claim to absolute truth, but such as depend upon truths that are themselves absolute. Before there can be exactness in an inference, there must be exactness in the antecedent propositions. A geometrician requires that the straight lines with which he deals shall be veritably straight; and that his circles, and ellipses, and parabolas shall agree with precise definitions—shall perfectly and invariably answer to specified equations. If you put to him a question in which these conditions are not complied with, he tells you that it cannot be answered. So likewise is it with the philosophical moralist. He treats solely of the *straight* man. He determines the properties of the straight man; describes how the straight man comports himself; shows in what relationship he stands to other straight men; shows how a community of straight men is constituted. Any deviation from strict rectitude he is obliged wholly to ignore. It cannot be admitted into his premises without vitiating all his conclusions. A problem in which a *crooked* man forms one of the elements is insoluble by him."

Spencer, The Data of Ethics—pp. 268 to 272.

The alleged necessary precedence of Absolute Ethics over Relative Ethics is thus, I think, further elucidated. One who has followed the general argument thus far, will not deny that an ideal social being may be conceived as so constituted that his spontaneous activities are congruous with the conditions imposed by the social environment formed by other such beings. In many places, and in various ways, I have argued that conformably with the laws of evolution in general, and conformably with the laws of organization in particular, there has been, and is, in progress an adaptation of humanity to the social state, changing it in the direction of such an ideal congruity. And the corollary before drawn and here repeated, is that the ultimate man is one in whom this process has gone so far as to produce a correspondence between all the promptings of his nature and all the requirements of his life as carried on in society. If so, it is a necessary implication that there exists an ideal code of conduct of formulating the behaviour of the completely adapted man in the completely evolved society. Such a code is that here called Absolute Ethics as distinguished from Relative Ethics—a code the injunctions of which are alone to be considered as absolutely right in contrast with those that are relatively right or least wrong; and which as a system of ideal conduct, is to serve as a standard for our guidance in solving as well as we can, the problems of real conduct.

§ 105. A clear conception of this matter is so important that I must be excused for bringing in aid of it a further illustration, more obviously appropriate as being furnished by organic science instead of by inorganic science. The relation between morality proper and morality as commonly conceived, is analogous to the relation between physiology and pathology ; and the course usually pursued by moralists is much like the course of one who studies pathology without previous study of physiology

Physiology describes the various functions which, as combined, constitute and maintain life ; and in treating of them it assumes that they are severally performed in right ways, in due amounts, and in proper order : it recognizes only healthy functions. If it explains digestion, it supposes that the heart is supplying blood and that the visceral nervous system is stimulating the organs immediately concerned. If it gives a theory of the circulation, it assumes that blood has been produced by the combined actions of the structures devoted to its production, and that it is properly aerated. If the relations between respiration and the vital processes at large are interpreted, it is on the pre-supposition that the heart goes on sending blood, not only to the lungs and to certain nervous centres, but to the diaphragm and intercostal muscles. Physiology ignores failures in the actions of those several organs. It takes no account of imperfections, it neglects derangements, it does not recognize pain, it knows nothing of vital wrong. It simply formulates that which goes on as a result of complete adaptation of all parts to all needs. That is to say, in relation to the inner actions constituting bodily life physiological theory has a position like that which ethical theory, under its absolute form as above concieved, has to the outer actions constituting conduct. The moment cognizance is taken of excess of function, or arrest of function, or defect of function, with the resulting evil, physiology passes into pathology We begin now to take account of wrong actions in the inner life analogous to the wrong actions in the outer life taken account of by ordinary theories of morals.

The antithesis thus drawn, however, is but preliminary. After observing the fact that there is a science of vital actions normally carried on, which ignores abnormal actions ; we have more especially to observe that the science of abnormal actions can reach such definiteness as is possible to it, only on condition that the science of normal actions has previously become definite ; or rather, let us say that apthological science depends for its advances on previous advances made by physiological science The very conception of disordered action implies a pre-conception of well-ordered action. Before it can be decided that the heart is beating faster or slower than it should, its healthy rate of beating must be learnt ; before the pulse can be recognized as to weak or too weak or too strong, its proper strength must be known ; and so throughout. Even the rudest and most empirical ideas of diseases, pre-suppose ideas of the healthy states from which they are deviations ; and obviously the diagnosis of diseases can become scientific, only as fast as there arises scientific knowledge of organic actions that are undiseased.

Similarly, then, is it with the relation between absolute morality, or the law of perfect right in human conduct, and relative morality which recognizing wrong in human conduct, has to decide in what way the wrong deviates from the right, and how the right is to be most nearly approached. When, formulating normal conduct in an ideal society we have reached a science of absolute ethics we have simultaneously reached a science which when used to interpret the phenomena of real societies in their transitional states, full of the miseries due to non-adaptation (which we may call pathological states) enables us to form approximately true conclusions respecting the natures of the abnormalities, and the courses which tend most in the direction of the normal.

Spencer, The Data of Ethics—pp. 275 to 277.

APPENDIX 8-A.

As foregoing chapters in various places imply, the entire field of Ethics includes the two great divisions, personal and social. There is a class of actions directed to personal ends, which are to be judged in their relations to personal well being, considered apart from the well-being of others ; though they secondarily affect fellow-men these primarily affect the agent himself, and must be classed as intrinsically right or wrong according to their beneficial or detrimental effects on him. There are actions of another class which affect fellow-men immediately and remotely, and which though their results to self are not to be ignored, must be judged as good or bad mainly by their results to others. Actions of this last class fall into two groups. Those of the one group achieve ends in ways that do or do not unduly interfere with the pursuit of ends by others—actions which, because of this difference, we call respectively unjust or just. Those forming the other group are of a kind which influence the states of others without directly interfering with the relations between their labours and the results, in one way or the other—actions which we speak of as beneficent or maleficent. And the conduct which we regard as beneficent is itself sub-divisible according as it shows us a self-repression to avoid giving pain, or an expenditure of effort to give pleasure—negative beneficence and positive beneficence.

Each of those divisions and sub-divisions has to be considered first as a part of Absolute Ethics and then as a part of Relative Ethics. Having seen what its injunctions must be for the ideal man under the implied ideal conditions, we shall be prepared to see how much injunctions are to be most nearly fulfilled by actual men under existing conditions.

Spencer, The Data of Ethics—pp. 281-282.

APPENDIX 8-B.

The statement that, in all languages, law primarily means the command of a Sovereign, and has been applied derivatively to the orderly sequences of Nature is extremely difficult of verification; and it may be doubted whether its value, if it be true, would repay the labour of establishing its truth. The difficulty would be the greater because the known history of philosophical and juridical speculation shows us the two notions, which as matter of fact are associated with Law acting and reacting on one another. The order of Nature has unquestionably been regarded as determined by a Sovereign command. Many persons to whom the pedigree of much of modern thought is traceable, conceived the particles of matter which make up the universe as obeying the commands of a personal God just as literally as subjects obey the commands of a sovereign through fear of a penal sanction. On the other hand, the contemplation of order in the external world has strongly influenced the view taken of laws proper by much of the civilised part of mankind. The Roman Theory of a Law Natural has affected the whole history of law; and this famous theory is in fact compounded of two elements, one furnished by an early perception, Greek in origin, of a certain order and regularity in physical Nature, and the other attributable to an early perception, Roman in origin, of a certain order and uniformity among the observances of the human race. I need not here repeat the proof of this which I attempted to give in a volume published some years ago.

No body is at liberty to censure men or communities of men for using words in any sense they please or with as many meaning as they please, but the duty of the scientific enquirer is to distinguish the meaning of an important word from one another, to select the meaning appropriate to his own purposes, and consistently to employ the word during his investigations in this sense and no other. The laws with which the student of Jurisprudence is concerned in our own day are undoubtedly either the actual commands of sovereigns, understood as the portion of the community endowed with irresistible coercive force, or else they are practices of mankind brought under the formula 'a law is a command' by help of the formula, 'whether the sovereign permits, is his commands.' From the point of view of the jurists law is only associated with order through the necessary condition of every true law that it must prescribe a class of acts or omissions, or a number of acts and omissions determined generally; the law which prescribes a single act not being a true law, but being distinguished as an 'occasional' or 'particular' command Law, thus defined and limited, is the subject matter of Jurisprudence as conceived by the Analytical Jurists.

The Early History of Institution by Maine—pp. 373-374.

APPENDIX 8-C.

Sec. 109—From that division of Ethics which deals with the right regulation of private conduct, considered apart from the effects directly produced on others, we pass now to that division of Ethics which, considering exclusively the effects of conduct on others, treats of the right regulation of it with a view to such effects.

The first set of regulations coming under this head are those concerning what we distinguish as justice.

Individual life is possible only on condition that each organ is paid for its action by an equivalent of blood, while the organism as a whole obtains from the environment assimilable matters that compensates for its efforts, and the mutual dependence of parts in social organism, necessitates that, alike for its total life and the lives of its units, there similarly shall be maintained a due proportion between returns and labours: the natural relation between work and welfare shall be preserved intact. Justice, which formulates the range of conduct and limitations to conduct, hence arising, is at once the most important division of Ethics and the division which admits of the greatest definiteness. That principle of equivalence which meets us when we seek its roots in the laws of individual life, involves the idea of *measure*; and on passing to social life, the same principle introduces us to the conception of equity or *equalness*, in the relations of citizens to one another: the elements of the questions arising are *quantitative*, and hence the solutions assume a more scientific form. Though, having to recognize differences among individuals due to age, sex, or other cause, we cannot regard the members of a society as absolutely equal, and therefore cannot deal with problems growing out of their relations with that precision which absolute equality might make possible, yet, considering them as approximately equal in virtue of their common human nature, and dealing with questions of equity on this supposition, we may reach conclusions of a sufficiently-definite kind.

This division of Ethics considered under its absolute form, has to define the equitable relations among perfect individuals who limit one another's spheres of action by co-existing, and who achieve their ends by co-operation. It has to do much more than this. Beyond justice between man and man, justice between each man and the aggregate of men has to be dealt with by it. The relations between the individual and the State, considered as represent-

ing all individuals, have to be deduced—an important and a relatively-difficult matter. What is the ethical warrant for governmental authority? To what ends may it be legitimately exercised? How far may it rightly be carried? Up to what point is the citizen bound to recognize the collective decisions of other citizens, and beyond what point may be properly refuse to obey them? These relations, private and public, considered as maintained under ideal conditions, having been formulated, there come to be dealt with the analogous relations under real conditions—absolute justice being the standard, relative justice has to be determined by considering how near an approach may, under present circumstances, be made to it. As already implied in various places, it is impossible during stages of transition which necessitate ever-changing compromises, to fulfil the dictates of absolute equity; and nothing beyond empirical judgments can be formed of the extent to which they may be, at any given time, fulfilled. While war continues and injustice is done between societies there can not be any thing like complete justice within each society. Militant organization no less than militant action, is irreconcilable with pure equity; and the inequity implied by it inevitably ramifies throughout all social relations. But there is at every stage in social evolution, a certain range of variation within which it is possible to approach nearer to, or diverge further from, the requirements of absolute equity. Hence these requirements have ever to be kept in view that relative equity may be ascertained.

(Spencer, Data of Ethics—sec. 109, p. 284—286.)

APPENDIX 9.

Sec. 69—Those who have followed with assent the recent course of thought, do not need telling that throughout past eras, the life, vast in amount and varied in kind, which has overspread the Earth, has progressed in subordination to the law that every individual shall gain by whatever aptitude it has for fulfilling the conditions to its existence. The uniform principle has been that better adaptation shall bring greater benefit; which greater benefit, while increasing the prosperity of the better adapted, shall increase also its ability to leave off-spring inheriting more or less its better adaptation. And, by implication, the uniform principle has been that the ill-adapted, disadvantaged in the struggle for existence, shall bear the consequent evils: either dis-appearing when its imperfections are extreme, or else rearing fewer off-spring, which, inheriting its imperfections, tend to dwindle away in posterity.

It has been thus with innate superiorities; it has been thus also with acquired ones. All along the law has been that increased function brings increased power; and that therefore such extra activities as aid welfare in any member of a race, produce in its structures greater ability to carry on such extra activities: the derived advantages being enjoyed by it to the heightening and lengthening of its life. Conversely, as lessened function ends in lessened structure, the dwindling of unused faculties has ever entailed loss of power to achieve the correlative ends: the result of inadequate fulfilment of the ends being diminished ability to maintain life. And by inheritance, such functionally-produced modifications have respectively furthered or hindered survival in posterity.

As already said, the law that each creature shall take the benefits and the evils of its own nature, be they those derived from ancestry or those due to self-produced modification has been the law under which life has evolved thus far; and it must continue to be the law however much further life may evolve. Whatever qualifications this natural course of action may now or hereafter undergo, are qualifications that cannot, without fatal results, essentially change it. Any arrangements which in a considerable degree prevent superiority from profiting by the rewards of superiority or shield inferiority from the evils it entails—any arrangements which tend to make it as well to be inferior as to be superior; are arrangements diametrically opposed to the progress of organization and the reaching of a higher life.

But to say that each individual shall reap the benefits brought to him by his own powers, inherited and acquired, is to enunciate egoism as an ultimate principle of conduct. It is to say that egoistic claims must take precedence of altruistic claims.

Sec. 70.—Under its biological aspect this proposition cannot be contested by those who agree in the doctrine of Evolution; but probably they will not at once allow that admission of it under its ethical aspect is equally unavoidable. While, as respects development of life, the well-working of the universal principle described is sufficiently manifest; the well-working of it as respects increase of happiness may not be seen at once. But the two cannot be disjoined.

In capacity of every kind and of whatever degree, causes unhappiness directly and indirectly—directly by the pain consequent on the over-taxing of inadequate faculty, and indirectly by the non-fulfillment, or imperfect fulfillment, of certain conditions to welfare. Conversely, capacity of every kind sufficient for the requirement, conduces to happiness immediately and remotely—immediately by the pleasure accompanying the normal exercise of each power, that is, up to its work, and remotely by the pleasures which are furthered by the ends achieved. A creature that is weak or slow of foot, and so gets food only by exhausting efforts or escapes enemies with difficulty, suffers the pains of over-strained powers, of unsatisfied appetites, of distressed emotions; while the strong and swift creature of the same species delights in its efficient activities, gains more fully the satisfactions yielded by food as well as the renewed vivacity this gives, and has to bear fewer and smaller pains in defending itself against foes or escaping from them. Similarly with duller and keener senses, or higher and lower degrees of sagacity. The mentally-inferior individual of any race suffers negative and positive miseries; while the mentally-superior individual receives negative and positive gratifications. Inevitably, then, this law in conformity with which each member of a species takes the consequences of its own nature; and in virtue of which the progeny of each member, participating in its nature, also takes such consequences; is one that tends ever to raise the aggregate happiness of the species, by furthering the multiplication of the happier and hindering that of the less happy.

All this is true of human beings as of other beings. The conclusion forced on us is that the pursuit of individual happiness within those limits prescribed by social conditions, is the first requisite to the attainment of the greatest general happiness. To see this it needs but to contrast one whose self-regard has maintained bodily well-being, with one whose regardlessness of self has brought its natural results; and then to ask what must be the contrast between two societies formed of two such kinds of individuals.

The Data of Ethics, p. 188—190.

APPENDIX 10.

Section 21 of the Indian Contract Act, (Act IX of 1872), provides that—"A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not enforce in British India has the same effect as a mistake of fact"

The principle on which the rule laid down in section 21 is to be found in the following passage:—

"*Mistake* of *Law.*—This accords with the English common law rule, that ignorance of law cannot be pleaded Money paid by a man who is apprised of the circumstances but ignorant that they afford him a legal defence, is, therefore, not recoverable (*a*). "The courts," said Chancellor Kent, "do not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind."(*b*).

Section 25 of the Indian Contract Act rules that—"An agreement made without consideration is void."

The principle on which the rule is based is stated as follows:—

Agreement without consideration.—The reason why the law enforces only those promises which are made for a consideration is that gratuitous promises are often made rashly and whithout due deliberation, and that, therefore, if promises made without consideration were enforceable, there would be a risk of a man's binding himself without any deliberate intention to do so. Another mischievous consequence of the enforcement of such promises would be the frequent preference of voluntary under takings to the claims of real creditors. The exceptions from the general rule are, as will be seen, cases in which the formalities observed and the relations of the parties are such as to rebut the probability of inadvertence or rashness suggested *prima facie* by the absence of consideration.

Section 27 of the Indian Contract Act laws down that—"Every agreement by which any one is restrained from excercising a lawful profession, trade or business of any kind, is to that extent void."

Restraint of Trade.—The general principle in favour of freedom of contract

---

(*a*). Bilbie *v.* Lumley, 2 East, 469; 6 R. R., 479.

(*b*). Cited in Stor. Eq Jur., note to s. 126; Vishnu *v.* Kashinath, 11 Bom, 17[1].

with its limitation was thus expressed in a recent case :—

"Public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that, when a man has, by skill or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and, in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser." (*a*).

(*a*) Leather Cloth Company *v.* Lorsont, L. R., 9 Eq , p. 354.

Commentaries on the Indian Contract Act by Cunningham—p. 118.

APPENDIX 10-A.

Section 14 of the Transfer of Property Act, (Act IV of 1882) enacts that—

"No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains fullage, the interest created is to belong."

The principle of section 14 of the Transfer of Property Act is set forth in the following extract:—

"The necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in, or dominion over, property, will be obvious if we consider, for a moment, what would be the state of a community in which a considerable proportion of the land and capital was locked up. The free and active circulation of property, which is one of the springs as well as the consequences of commerce would be obstructed; the improvement of land checked; its aquisition rendered difficult; the capital of country withdrawn from trade; and the incentives to exertion in every branch of industry diminished. Indeed, such a state of things would be utterly inconsistent with national prosperity; and those restrictions, which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptional motives, would be baneful to all."(1) "The rules against perpetuities, while they are efficient for the purpose of preserving and guaranteeing the free circulation of property to the utmost reasonable extent, yet afford ample scope for that attention to personal and family exigencies, which it is neither the policy of the laws, nor the interest of society, entirely to overlook."(2) "A perpetuity is a limitation, tending to take the subject out of commerce, for a longer period than a life or lives in being, and twenty-one (in India eighteen)(3) years beyond, and in the case of posthumous child, a few months more, allowing for the term of gestation."(4) "A perpetuity," said Lord Guildford, "is a thing odious in law, and destructive to the common wealth; it would put a stop to commerce, and prevent the circulation of the riches of the Kingdom; and therefore is not to be countenanced in equity.

---

1. Jarman on Wills, vol. I, pp. 250, 251, (4th Edition.)
2. Lewis on the law of Perpetuity introduction.
3. Sec. 3 of the Indian Majority Act, (Act IX of 1875.)
4. *Idem*, Chap. 12.

Transfer of Property Act by H. S. Gour, p. 79, 1st edition.

APPENDIX 10-B.

Section 51 of the Transfer of Property Act provides that—"When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement. The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction."

When, under the circumstances, aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

The principle which furnishes a ground mark for section 51 is expended as ollows:—

This section is founded upon the principle that he who will have equity must do equity. Says Snell :—"A cunstructive trust may also arise where a person, who is only part owner, acting *bona fide*, permanently benefits an estate by repairs or improvements ; for a lien or trust may arise in his favour in respect of the sum he has expended in such repairs or improvements(1). Thus, it was intimated in Neesom *v.* Clarkson (2) that although a person expending money by mistake upon the property of another has no equity against the owner, who is ignorant of and did not encourage him in his expenditure (3), yet if it were necessary for the true owner to proceed in equity, he would only be entitled to its assistance according to the ordinary rule, by doing equity and making compensation for the expenditure, so far, of course, and only so far, as the expenditure was necessary, and has proved permanently beneficial. But a person will have no equity who lays out money on the property of another with full knowledge of the state of the title (4) ; or who lays out money unnecessarily or improperly."(5) Says Lord Cranworth, L. C., that—"to raise such an equity, two

1. Lake v. Gibson, Smith's L. C., 198.
2. 4 Hare, 97.
3. Nicholson v. Hooper, 4 My. and Cr., 186.
4. Rennie v. Young, 2 DeG. and Jo. 136; Ramsden v. Dyson, 1 H. L., 129; Price v. Neault, 12 App. Cas., 110.
5. Snell's Equity, pp. 148, 149 ; see also Story's Eq. Juris. § 1237, p. 861.

'things are required : first, that the person expending the money supposes himself to 'be building on his own land ; and, secondly, that the real owner, at the time of the expenditure, knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For, if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing on my conduct, active or passive, making it inequitable in me, to assert my legal rights. It follows as a corrollary from these rules, or, perhaps, it would be more accurate to say it forms part of them, that if my tenant builds on of land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end."(1) Under this section, however, it is not necessary that the real owner should know that the land improved upon belongs to him—as required by the English law. It is sufficient that the transferee at the time believed in his absolute title, and this has been the law in India from before the passing of this Act.(2) The term "Transferee" does not include a person having only the benefit of an obligation—as under a contract to purchase.

---

1. Ramsden v. Dyson, 1 H. L., at p. 141, followed in Kunhammad v. Narayamen, I. L. R., 12 Mad., 320.

2. See in re Thakoor Chunder Paramanick, B. L. R., Sup. Vol. 595, F. B.

Transfer of Property Act by H. S. Gour—p. 154, 1st edition.

APPENDIX 10-C.

Sec. 53 of the Transfer of Property Act runs as follows:—"Every transfer of immoveable property made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defeated or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

The principle on which Section 53 is based is stated as follows:—"The intrinsic justice of the rule here laid down is so patent that any enunciation of the principle upon which it is founded is wholly unnecessary. The Elizabethan enactments upon which this action is founded have in turn their origin in the Roman Civil Law, which proceeded upon the same enlightened policy. In the case of alienations of moveables and immoveables, *bona fide* purchasers for a valuable consideration, having no knowledge of any fraudulent intent of the grantor or debtor, were protected."(1) Thus says Justinian:—"If, again to defraud his creditors, a man delivers anything to some one else, after his goods have been taken possession of by the creditors under a decision of the President, the creditors themselves are allowed to rescind the delivery and to demand the thing; that is, to allege that the thing was not delivered, and therefore remained among the debtor's goods."(2) "Indeed," says story, "the principle is more broad and comprehensive; and, although not absolutely universal . . . . yet it is generally true, and applies to case of every sort, where an equity is sought to be enforced against a *bona fide* purchaser of the legal estate without notice, or even against a *bona fide* purchaser, not having the legal estate, where he has a better right or title to call for the legal estate than the other party. It applies, therefore, to cases of accident and mistake, as well as to cases of fraud, which, however remediable between the original parties, are not relievable, as against such purchasers, under such circumstances."(3) Thus, to present a summary of what has been already stated, if conveyances or other instruments are fraudulently or improperly

1. Story's Eq. Jur., 2nd Eng. Ed., S. 435, p. 278.
2. Jus. Bk. 4, Tit. 6, sec. 6; see Hunter's Roman Law, pp. 1040, 1041.
3. Story's Eq. Jur., 2nd Eng. Ed., S. 436, p. 279.

obtained, they are decreed to be given up and cancelled. If they are money securities on which the money has been paid, the money is decreed to be paid back. If they are deeds, or other muniments of title, detained from the rightful party, they are decreed to be delivered up. If they are deeds suppressed or spoliated, the party is decreed to hold the same rights as if they were in his possession and power. If there has been any undue concealment, or misrepresentation or specific promise collusively broken, the injured party is placed in the same situation, and the other party is compelled to do the same acts, as if all had been transacted with the utmost good faith. If the party says nothing, but by his expressive silence misleads another to his injury, he is compellable to make good the loss ; and his own title, if the case requires it, is made subservient to that of the confiding purchaser. If a party, by fraud or misrepresentation, induces another to do an act injurious to a third person, he is made responsible for it. If, by fraud or misrepresentation, he prevents acts from being done, equity treats the case, as to him, as if it were done ; and makes him a trustee for the other. If a will is revoked by a fraudulent deed, the revocation is treated as a nullity. If a devissal obtains a devise by fraud, he is treated as a trustee of the injured parties. In all these, and many other cases which might be mentioned, courts of equity undo what has been done, if wrong ; and do what has been left undone, if right."(1) This section should be interpreted in the light of cases decided under the Statute, 27 Eliz., c 4,(3). it may be added, as modified by the Voluntary Conveyances Act, 1893.(3)

---

1. Story's Eq. Jur., S. 439, pp. 279-280.

2. Jashua v. Alliance Bank of Simla, I. L. R., 22 Cal., p. 185.

3. 56 and 56 Vic., Ch. 21.

Transfer of Property Act by H. S. Gour—pp. 168-169, 1st edition.

APPENDIX 10-D.

Section 52 of the Transfer of Property Act rules that—"During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentions suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

The principle underlying the section is to be found in the following extract :—"The principle of this section has been thus explained by Turner, L. J., in the leading case of Bellamy *vs.* Sabine"(1):—"It is a doctrine common to the Courts, both of law and equity, and rests, I apprehend, upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were allowed to prevail. The plaintiff would be liable to be defeated in every case by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings *de novo* subject again to be defeated by the same course of proceeding." Says Story :—"Every man is presumed to be attentive to what passes in the Courts of Justice of the state or sovereignty where he resides. And, therefore, a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit."(2) This doctrine of constructive notice has been, however, condemned by the Indian High Courts.(3) There can be no doubt that the principle of

---

1. 1 DeG. and J., 566.

2. 2nd Eng. Ed., 262.

3. By Collins, C. J. and Wilkinson, J., in Abhoy *v.* Annamalai, I L. R., 12 Mad., 180 ; Krishnappa *v.* Bahiru, 8 B. H. C. R. (Ac), 59 ; Kailas Chandra *v.* Fulchand, 8 B. L. R., 474.

lis pendence does not rest upon an implied or constructive notice of the proceedings of the law Courts, but rather upon necessity—the necessity that neither party to the litigation should alienate the property in dispute so as to affect his opponent.(1) For, if during the pendency of any action at law or in equity the claim to the property in controversy could be transferred from the parties to the suit so as to pass to a third party, unaffected by either the prior proceedings or the subsequent result of the litigation, then all transactions in our Courts of Justice would, as against men of ordinary fore-thought, prove mere idle ceremonies. The rule no doubt originated in the Roman Law which provided "*Ram de qua controversia prohibimur in aerum dedi care.*"

---

1 Bennett's "Lis Pendens," 78; see C. P. Sel. Cas. (1880), No. 50.

Transfer of Property Act by H. S. Gour—pp. 158 and 159. 1st edition.

APPENDIX 10-E.

Section 59 of the Transfer of Property Act enacts that—"Where the principle money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor of his agent of documents of title to immoveable property, with intent to create a security thereon."

The principle of section 59 is stated in the following extract:—"As has been explained in the commentary on sec. 54, the primary object of these sections was to prevent fraud by giving greater security to titles created thereby, as also to simplify the determination of the question of title even where conflicting claims are made. The policy of this section is thus explained in the third report of the Select Committee, dated 11th March 1881. "We agree with the law Commissioners that the requirements of registration will not only discourage fraud and facilitate investigations of title, but that it will also preclude some difficult questions of priority. A majority of us, however, think that where the principal money secured is less than rupees 100, the assurance need not be registered, and we have altered the Bill accordingly. Our colleague, Mr. Stokes, dissents from this alteration, as in his opinion, all encumbrances should appear on the register. Those who mortgage their property for small amounts, as a rule, require protection from fraud more than those who mortgage for large amounts, and the changes impending on the working of the law will deprive the requirement of registration of all hardship even in the pettiest case."(1)

---

1. Cited in Krishnamma v. Surahna, I. L. R., 16 Mad., 148, pp. 167 and 168, F. B.

Transfer of Property Act by H. S. Gour—pp. 263 and 264. 1st edition.

APPENDIX 10-F.

Section 85 of the Transfer of Property Act lays down that—"Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest."

The principle underlying section 85 is explained in the following extract:—"The section is enacted to avoid the multiplicity of suits, and the conflicting decisions which such suits may occasion. Prior to the Act when "there was no machinery for bringing into one suit the various incumbrances on the property, endless confusion had been the result, and the decisions of the Courts upon the almost insoluble problems arising from the state of things had been numerous and contradictory. The result was that the mortgage property could not fetch anything like its value. The debtor was ruined, the honest and respectable money-lender discouraged, and a vast amount of gambling and speculative litigation fostered . . . . It had been one of the objects of this chapter to remedy those and other similars evile."(1) Thus then while the rule avoids multiplicity and protects the rights of all parties interested in the mortgage, it is also consonant with the right of the mortgagee to account once only, which can only be done if the account is taken in the presence of all the parties who cou'd demand an account."(2).

---

1. Sir Griffith Evan's speach on the Bill, Abstract of Proceedings of the Governor-General's Legislative Council printed in the Appendix ; cited in Mata Din *v.* Kazim Husain, I. L. R., 13 Alla., 432 (530,) F. B.

2. Palk *v.* Clinton, 12 Ves., 48.

Transfer of Property Act by H. S. Gour—pp. 404 and 405. 1st edition.

APPENDIX 10-G.

Section 23 of the Indian Evidence Act, (Act I of 18) provides that—"In civil cases(1) no admission is relevant, if it is made either on an express condition that evidence of it is not to be given,(2) or under circumstances from which the Court can infer that the parties agreed together(3) that evidence of it should not be given."(4)

The principle of sec. 23 of the Indian Evidence Act is stated as follows :—"Confidential overtures of pacification and any other offers or propositions between litigating parties, expressly or impliedly made *without prejudice*,(5) are excluded on grounds of public policy. For without this protective rule, it would often be difficult to take any steps towards an amicable compromise or adjustment, and as Lord Mansfield has observed, all men must be permitted to buy their peace, without prejudice to them should the offer not succeed ; such offers being made to stop litigation, without regard to the question whether

---

1. The protection given by this section does not extend to criminal cases ; see S. L. 29, *post*. As to arbitrations, see p. 9, Ante.

2. Cory *v.* Bretton, 4 C. and P., 462.

3. This section, as drafted in the original Bill, contained "infer that *it was the intention of the parties* that" for "infer that *the parties agreed together* that."

4. Paddock *v.* Forrester, 3 M. and G., 903, 918 : Steph. Dig., Art. 20, adds, "or if it was made under duress." Stockfleth *v.* De Tastet, 4 Camp., 11, per Lord Ellenborough : see Taylor, Ev., § 798, and *post*.

5. In re River Steamer Co., L R. 6, Ch. 822, 827, per James, L. J., "does not 'without prejudice' mean, 'I make you an offer ; if you do not accept it, this letter is not to be used against me :'" *ib.*, 831, 832. "Now if a man says his letter is without 'prejudice,' that is tantamount to saying, 'I make you an offer which you may accept or not, as you like ; but if you do not accept it, the having made it is to have no effect at all.'" per Mellish, L, J., see also Walker *v.* Wilsher, 23 Q. B. D., 335, 337, per Lindley, L. J.

anything is due or not."(1) It is most important that the door should not be shut against compromises.(2) When a man offers to compromise a claim, he does not thereby necessarily admit it, but simply agrees to pay so much to be rid of the action,

---

1. Taylor, E. V., § 795, and see *ib.*, §§ 774, 796, 797 and cases there cited; Roscoe, N. P. Ev., 62, 63; Steph. Dig., Art. 20; Powell, Ev., 303. Phillipps, Ev., 326.

2. Per Bowen, L. J., in Walker *v.* Wilsher, supra.

The Law of Evidence by Ameer Ali and Woodroffe—
pp. 160 and 161,

APPENDIX 10-H.

Section 25 of the Indian Evidence Act runs as follows :—"No confession made to a Police officer(1) shall be proved as against a person accused any offence(2).

The principle of Section 25 is stated as follows :—"The powers of the police are often abused for purposes of extortion and oppression ;(3) and confessions obtained by the police through undue influence have been the subject of frequent judicial comment (4) "The object of this section is to prevent confessions obtained from accused persons through any undue influence being received as evidence against them."(5) If a confession be "made to a police officer, the law says that

---

1. In Upper Burma, after the word "Police officer," the words "who is not a Magistrate" are to be inserted : see Act XX of 1886, s. 7 (1) (*d*).

2. The above section was taken from s. 148, Act XXV of 1861 (Cr. Pr. Code) ; see Queen-Empress *v.* Babu Lal, I. L. R., 6 All., 509, 512 (1884). As to statements made to a Police officer investigating a case, see Cr. Pr. Code, ss. 161 162 ; Queen-Empress *v.* Taj Khan, I. L. R. 17, All, 57, (1894), and as to the use of police reports and diaries and statements made before the police ; Government *v.* Madun Dass, 6 W. R., Cr., 52 (1866) ; Queen *v.* Bissen Nath, 7 W. R., Cr., 31 (1867) ; Queen *v.* Bussir-uddi, 8 W. R., Cr., 35 (1867) ; Queen v. Hurdut Surma, 8 W. R., Cr., 68 (1867), Queen *v.* Nobokiste Ghose, 8 W. R., Cr, 87, 90 (1867); In the matter of Mohesh Chunder Banerjee, 13 W. R, Cr., 1, 10 (1870) : In the matter of Bhudressory Chowdhranee, 16 W. R., Cr., 17 (1871) ; In the matter of Obhoy Chowdry, 15 W. R, Cr., 42 (1871) ; The Queen *v.* Wuzeerah, 17 W. R, Cr., 5 (1872) ; Cr. Pr. Code, ss. 162, 172 and Ch. XIV, *ib.* passim, with cases cited thereunder Agnew and Henderson's Cr. Pr. Code, 3rd ed., 1893.

3. See Extract from the First Report of the Indian Law Commissioner's cited in Field, Ev. 140—142 ; and remarks of Straight, J., in Queen-Empress *v.* Babu Lal, I. L. R., 6 All, 509, 542 (1884), and Mahmood, J. *ib*, 523 ; but see also remarks of Duthoit, J., *ib*, 550.

4 V. Ante. pp. 165, 166.

5. Per Garth, C. J., in Queen *v.* Hurribote Chunder Ghose, I. L. R., 1 Cal., 207 215 (1873) ; 25 W. R., Cr., 36 : see also in the matter of Hiran Miya, 1 Cal., L. R., 21 (1877) ; Empress of India *v.* Pancham, I. L. R., 4 All, 198, 204 (1882). Sections 25, 26, 27 "differ widely from the law of England and were inserted in the Act of 1861 (from which they have been taken) in order to prevent the practice of torture by the police for the purpose of extracting confessions." Steph. Introd., 165.

such a confession shall be absolutely excluded from evidence, because the person to whom it was made is not to be relied on for proving such a confession, and he is, moreover, suspected of employing coercion to obtain the confession "(1)

---

1. Queen-Empress *v.* Babu Lal, I. L. R., 6 All., 509, 532 (1884,) *per* Mahmood and v. *ib*, 544, *per* Straight, J., *ib*, 513 *per* Oldfield, J. "The broad ground for not admitting confessions made to a Police-officer is to avoid the danger of admitting false confessions."

The Law of Evidence by Ameer Ali and Woodroffe—p. 171.

APPENDIX 10-I.

Section 31 of the Indian Evidence Act lays down that—"Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained."

The principle on which section 31 is based is stated as follows :—The policy of the law favours the investigation of truth by all expedient methods. The doctrine of estoppels, by which further investigation is precluded, being an exception to the general rule, and being adopted only for the sake of general convenience, and for the prevention of fraud, will not be extended beyond the reasons on which it is founded (1) Therefore admissions, whether written or oral, which do not operate by way of estoppel, constitute only *prima facie* and rebuttable evidence against their makers and those claiming under them, as between them and others.(2)

---

1. Taylor, Ev., § 817.

2. Powell, Ev., 288 : thus a receipt endorsed on a bill, and generally, all parol receipts, are only *prima facie* evidence of payment, *b.*, 289 : "in general, a person's conduct and language have not the effect of operating against him by way of estoppel." per Chambre, J., in Smith *v.* Taylor, 1 N. R., 210

The Law of Evidence by Ameer Ali and Woodroffe—
p. 204

APPENDIX 10-J

Section 32, cl. I of the Indian Evidence Act deals with statements as to cause of death, (Section 32, cl. I), and the principle on which the clause is based is set forth as follows :—The ground of admissibility of "dying declarations," as they are called, is said to rest, firstly, on necessity,(1) the injured person, who is generally the principal witness, being dead ; and secondly, on the *presumption* that the solemnity of the approach of death impels the party to speak the truth and supplies the obligation of an oath. *Nemo moriturus praesumitur mentiri.*(2) According to English law, it is the *impression* of *impending* death, and not the rapid succession of death in point of fact, which renders the testimony admissible.(3) But in so far as it is not necessary under this act that the declaration should have been made under expectation of death,(4) the first named ground appears to be more properly that on which this kind of evidence is receiveable. When however, the statement has been so made, it will further have the sanction which the approach of death affords in the greater number of cases. According to English law evidence of this description is admissible in no civil case, and in criminal cases only in the single instance of homicide (v. *post*). But the above mentioned sanction has nothing to do with the nature of the crime of other act to which the evidence relates ; it is just as existent in the case of declaration relating to the commission of one offence as an other. Further if this evidence be admitted on the ground of necessity is just as likely to exist where the deceased person has been robbed, or raped, or assaulted as where he or she have been murdered(5). And therefore under the Act the statement is admissible, whatever may be

1. Steph. Introd., 165.

2. Taylor, Ev., § 716 ; Norton, Ev., 176 ; Roscoe, Cr. Ev , 31 This ground seems not to have been admitted in Queen *v.* Bissorunjun Mookerjee, 6 W. R., Cr., 75 *(1866)*.

3 Taylor, Ev. §§ 714, 717, 718, Queen *v.* Bissoorunjun Mookerjee, supra ; in the matter of Sheikh Tenoo, 14 W R, Cr., 11, 13 (1871*)* ; see observations of Eyre, L. C. B. in R., *v.* Woodcock, 1 Lea., 502, cited in the last mentioned case at p. 13 and in Field, Ev., 170 ; and see remarks in Field, Ev., pp. 174, 175, in which the learned author states that he has in more than one instance known a statement made by a person, who did not expect to live many hours, turn out to be wholly and utterly untrue. And see Whitely Stokes, ii, 841 ; "Dying declarations in India are not to be regarded as if they were made in England."

4. Taylor, Ev., § 718.

5. v. *post*, s. 32, cl (1) Commentary.

6. Queen *v.* Bissorunjun Mookerjee, supra, 76.

the nature of the proceeding in which the cause of the death of the person, who made the statement, comes into question (v. *post*). Three reasons have been given for restricting the application of this evidence to cases of homicide ; (1) the danger of perjury in fabricating declarations the truth or falsehood of which it is impossible to ascertain ; (2) the danger of letting in incomplete statements, which, though true as far as they go, do not constitute " the whole truth ;" (3) the experienced fact, that, implicit reliance cannot in all cases be placed on the declarations of a dying person ; for his body may have survived the powers of his mind ; or his recollection, if his senses are not impaired, may not be perfect ; or, for the sake of case and to be rid of the importunity of those around him, he may say, or seem to say whatever they choose to suggest(1). These considerations, though they have not been regarded, by the framers of the Act as sufficient to excluded this form of evidence in all cases other than those of homicide, may yet well be borne in mind when estimating the *weight* to be allowed to dying statements in particular cases.(2) This kind of evidence has been found to be on the whole useful and necessary, but the caution with which it should be received has often been commented upon. It will often happen that the particulars of the violence to which the deceased has spoken were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences also of the violence may occasion an injury to the mind and an indistinctness of memory as to the particular transaction. The deceased may have stated his inferences from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them Such evidence, therefore, is liable to be very incomplete. He may naturally, also, be disposed to give a partial account of the occurrence, although possibly not influenced by animosity or ill-will. But it cannot be concealed that animosity and resentment are not unlikely to be felt in such a situation(3). Such considerations show the necessity of caution in receiving impressions from accounts given by persons in a dying state ; especially when it is considered, that they cannot be subjected to the power of cross-examination, and the security afforded by the terror of punishment and the penalties of perjury cannot exist in this case. Further, the remarks before made on verbal statements which have been heard and reported by witnesses applies equally to dying declarations ; namely, that they are liable to be misunderstood and misreported, from in attention, from misunderstanding or from infirmity of memory.(4)

1. Taylor, Ev., § 716.

2. Field Ev., 171.

3. Roscoe, Cr. Ev., 36 ; 1 Phill. and Arn., Ev., 251 ; see Taylor, Ev., § 722 ; falsehood and the passion of revenge must also be guarded against, and this more especially in India ; see remarks in Field, Ev., 174, 175 ; Whitley Stokes, ii 841.

4. Roscoe, Cr., Ev , *ib*., 1 Phill., and Arn , *ib*.

APPENDIX 10-K.

Section 92 of the Indian Evidence Act, rules that—"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms."(1)

The principle on which section 92 is based is to be found in the following extract:—"When parties have deliberately put their mutual engagements into writing it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently, other and extrinsic evidence will be rejected, because such evidence, while deserving far less credit than the writing itself, would invariably tend in many instances to substitute a new and different contract for the one really agreed upon(2). *See* Note upon the principle of last section, as also the Introduction,

---

1. See Illustrations *(a)*, *(b)*, *(c)*. As to strangers to the instrument, *see* s. 99 *post*. In England the rule also only applies to cases in which some *civil* right or liability is dependent upon the terms of a document in question. Steph. Dig., Art. 92. The Act makes no allusion to this. As to *Contradiction*, *see* Lano *v.* Neale, 2 Starkie, 105; Abbott *v.* Hendricks, I. M. & G., 794; Higgins *v.* Senior, 8 M. & W., 854; as to *Variation*, *see* Mease *v.* Mease, Cowper, 47; Rawson *v.* Walker, 1 Starkie, 361; Hoare *v.* Graham, 3 Camp, 57; Morley *v* Harford, 10 B. & C., 729; as to *Addition see* Millar *v.* Travers, 8 Bing, 254; Preston *v.* Merceau, 2 Wm. Bl., 1249; Maybank *v.* Brooks, 1 Brown Ch. Ca., 84; Meres *v.* Ansell, 3 Wills, 275; as to *Subtraction*, *see* Kaines *v.* Knightly, Skinner, 54; Weston *v.* Emes, 1 Taunt., 115; Norton, Ev., 273, 274; Goodeve, Ev., 362, 364; no absolute classification of the cases under these headings is, however, possible as the evidence tendered frequently has the effect of offending in several or all of these points.

2. Taylor, Ev., §§ 1132, 1158; Greenleaf, Ev., § 275; Best, Ev., § 226; Banapa *v.* Sundar Das, Jagjivan Das, I. L. R., 1 Bom., 333, 338 (1876). [The apparent object of the section is the discouragement of perjury]; Starkie, Ev., 655.

Ante, and Notes, *post*. Unless the rule enacted by this section were observed, people would never know when a question was settled as they would be able to play fast-and-loose with their writings Therefore if a document purports to be a final settlement of a previous negotiation, as in the case of a written contract, it must be treated as final and not varied by word of mouth(1). And where the law expressly requires that a matter should be reduced to the form of a document the admission of extrinsic evidence would plainly render such requirement nugatory."

1, Steph. Introd, 172.

The Law of Evidence by Ameer Ali and Woodroffe—p. 531.

APPENDIX 10-L.

Section 115 of the Indian Evidence Act formulates the rule of estoppel in the following terms :—"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

The principal of the rule of estoppel is stated as follows :—"The principle upon which the rule of estoppel rests is, that it would be most inequitable and unjust that if one person by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it."(1)

---

1. Sarat Chunder Day *v.* Gopal Chunder Laha, L. R, 19 I. A., 203, 215, 216, (1892); see Citizens Bank of Louisiana *v.* First National Bank of New Orleans, L. R., 6 E. & I. A., 352, 360.

APPENDIX 10-M.

The rule of *res-judicata* is laid down in section 13 of the Code of Civil Procedure, (Act XIV of 1882) in the following terms :—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of Jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

The principles furnishing a foundation for the rule of *res-judicata* are stated as follows :—The rule of *res-judicata* is based on the principles : *Interest rei publicæ ut sit finis litium*, and nemo *debet bis vexari pro eadem causa* ; even though in individual cases, it sometimes operates harshly. Justice indeed requires that every cause be tried, but public tranquillity requires that having been tried once, all litigation as to that cause between those parties should be, for ever, closed. Though originally based on the natural presumption of the correctness of the decision of a court, it "does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts."(1) The judgment which is entertained in particular instances, as observed by Evans in his notes on his translation of Pothier's work on Obligations,(2) may be and often must be founded upon erroneous reasoning, but as the subject, wherever it rests, must ultimately by subject to human infirmity, the imputation of such error ought not to be regarded as an impeachment of the authority, unless applied in its direct correction, according to the regular course of an appellate procedure."

---

1. Behari Lal *v.* Majid Ali, 1897, W. N. 29.

2. II, 346.

APPENDIX 10-N.

Section 43 of the Code of Civil Procedure, (Act XIV of 1882) provides that—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action : but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."

The principle of section 43 is stated as follows :—The principle underlying the rule embodied in the section forbids double vexation for the same thing, and being intended to suppress serious grievances is "a rule of justice and not to be classed among technicalities."(1) If a party may divided single and entire cause of action once, there can be no limit but the caprice and the will of the party to endless divisions ; and what depends upon the mere caprice or will of an adversary, may be said to be without limit.(2) Speaking of the rule, Sir Whitley Stokes says :—"Were the rule otherwise, a man might be sued repeatedly in respect of different parts of the same matter, and conflicting judgments might be pronounced regarding separate portions of the same property, inclaimed in the same cause of action. And as the value of the property claimed by the plaint determines the class of judges by which a suit is cognizable and the remedies of the parties in an appeal, a suit might be split up so that each branch of it should be decided by a judge of a lower class than that by which, with reference to the value of the whole property in litigation, it ought to be decided, and the right of the parties to appeal would be unfairly limited."(3) The rule being based, however, unlike that of *res judicata*, exclusively on the ground of public policy, has no application where the suit was in a foreign Court, and is dependent entirely on the identity of the cause of action, the bar being created by the institution of the suit and not by the rendition of the judgment.

---

1. Dutton *v.* Shaw, 35 Mich., 431.
2. Herm. Comm., 220.
3. II Ang. Ind. Codes, 897.

APPENDIX 10-O.

The principles on which the rules of Limitation are based have been thus stated:—The main consideration on which the doctrine 'of limitation and prescription' is founded is *public policy*. "Usucapion," says Gaius (Digest, Bk. XLI, tit. 3, art. 1), "was introduced for the public good, *viz.*, lest ownership of sundry things be left uncertain for a long time and often for ever: seeing that a fixed period would suffice for the diligence of owners." The reason of the rule of usucapion, according to justinian, is "the *inexpediency* of allowing ownership to be long unascertained." "Prescription," said Wayne, J., "is a thing of policy growing out of the experience of its necessity."(1) "Prescription," wrote Lord Stair (Institutions, Bk. II, tit. 12, s. 9) "is founded upon utility more than upon equity."

To secure the quiet and repose of the community, it is necessary that the title to property, and matters of right in general, should not be in a state of constant uncertainty, doubt and suspense.(2) The law of limitation and prescription prevents this uncertainty. It not only quiets disputes between individuals, but in the interests of the public declares that the possession of property for a certain length of time is directly or indirectly a good title. A person who has been long in possession acquires a credit which is attributable to such possession, and it is of great importance to the public that his possession should not be lightly disturbed.(3)

---

1. See Story's conflict of laws, paragraph 582*a*.

2. Puffendarf. Bk. IV, chap. 12, sec. 6. The doctrine of the law is that the dominion of things must not long remain uncertain, so as to disturb the peace of society by giving rise to numerous and perpetual litigations; and that, to prevent such serious evil, the laches of those who are dilatory in pursuing their just remedies, should be punished, and that those who are indolent shall impute to themselves the punishment. (Domat's Civil Law, L. 8, T. 7, sec 4).

3. See Brown on the law of Limitation as to Real Property, p. 14. Professor Amos, in his Systematic View of the Science of Jurisprudence, (p 346) mentions the following as one of the grounds on which the doctrine of prescription is based: "The expediency of not disturbing the existing states of things in view of public expectation being based on their continuance, and not on their disturbance."

Prescription is "conducive to the *public* security and the quieting of disputes"—Bom Reg. V of 1827, preamble.

The object of the Legislature in passing statutes of limitation is to quiet long possession and to extinguish stale demands. (Luchmee Bux v. Runjeet Ram, 20 W. R., 375, P. C.).

Unlimited and perpetual litigation disturb the peace of society and lead to disorder and confusion. A constant dread of judicial process and a feeling of insecurity retard the growth or prosperity of a nation, and labour is paralysed when the enjoyment of its fruits is uncertain.(4) Moreover where stale claims leave the Courts little or no time to attend promptly to more recent and urgent cases, creditors and injured parties in general are led to suspect the readiness of the State to enforce their rights. It is therefore expedient that the possibilities of litigation should be limited and restricted. The old maxim of law is *Interest reipublicæ ut sit finis litium.*(5) The interests of the State require that a period should be put to litigation.

The law of limitation and prescription prescribes this limit. It prevents persons from enforcing their own rights, and disputing the rights of others, after a certain period of time, and thus quiets titles, facilitates transfers.(6) and enhances the value of property. It enables men to reckon upon security from further claim and to act upon it.(7)

The necessity for putting a limit to litigation arises also from "the perishable nature of man and all that belongs to him."(8). It has been said by John Voet that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal.(9) The death of parties and witnesses, the loss or destruction of documents, and the fading of memory, in the course of time, rendered such a limit highly expedient. "Time," said Lord Plunkett, Lord Chancellor of Ireland, "holds in one hand a scythe, in the other an hour-glass. The scythe moves down the evidence of our rights, the hour-glass measures the period which renders that evidence superfluous."(10) The law of limitation and prescription "repairs the injuries committed by time" and ensures justice by supplying the deficiency of proof.

---

4. See Angell on Limitations, s. 9.

5. See Ruckmabye *v.* Lulloobhoy, 5 Moo. I. A., p. 234.

The admission of a proprietary right grounded upon the mere efflux of time is intended to give *security* to property and to *diminish litigation.* (Hall's International Law, p. 111).

6. This law enables us, at least partially, "to abridge the length of abstracts and to simplify the deduction of titles." Banning, p 4.

7. Per Markby, J., in Krishna Mohan Bose *v.* Okhil Money Dassi, I. L. R., 3 Cal., 331.

8. Phillimores Private Roman Law, p. 125.

9. See Story's Conflict of Laws, Title *Prescription;* and Brown on Limitation, p. 10.

10. See Dr. Stoke's Speech in the Legislative Council, 19th July 1877.

A statute of limitation and prescription is not only a statute of *public* peace and repose, but it is at the same time a means of ensuring *private* Justice, suppressing fraud and perjury, quickening diligence, and preventing oppressions. (1) It is unfair to call upon a person to defend an action at a time when his muniments of title, acquittances or other documents are (very likely) lost or to destroyed, and when he cannot be expected to produce the witnesses necessary to support his case or to meet the charge made against him.(2) If claims might be postponed to an indefinite period, the Courts would have the utmost difficulty in ascertaining the truth of facts, and in confuting fraud and perjury.(1). Experience shows that fraud and perjury have a better chance of success, when the stateness of the claim renders the preservation of the evidence relating to it less probable.(3) Justice to the defendant requires that the plaintiff's want of diligence should be discouraged as much as possible It is extremely hard to dispossess parties who have long been in quiet enjoyment of property, unconscious of any defect of title, and with habits and plans of life influenced by the income which the property produces.(4) And to enforce the payment of a debt, which time and misfortune have rendered the debtor unable to discharge, and which he was led to believe would never be demanded, savours more of cruelty than of justice.(5)

But does the law ensure justice in every case? Does it not, on the other hand, offer a premium to persistence in wrong? The answer to these questions is, that the law aims at the *greatest good* of the *greatest number*, and "is based on that compromise between occasional wrong and general right which is inseparable from the condition of a finite being."(6) The legitimate object of the law is not to favour usurpers or to enable debtors to escape payment of their debts, but to quiet long continued possession, and to protect persons who have long enjoyed a right or an immunity, from being harassed by state demands. The law

---

1. Story's Conflict of Laws, s. 576, see also White *v.* Paruthers, 1 Knapp's Privy Council Reports, pp. 179, 227.

2. See Battley *v.* Faulkner, 3 Barn. and Ald., 288, 293. See also Chhagan Lall *v.* Bapubhae, I. L. R., 5 Bom., 68, 72.

3. Westlake's Private International Law, Ed. of 1880, p 252.

4. White *v.* Paruthers, 1 Knapp's Privy Council Reports, pp. 179, 227.

5. A'Court *v.* Cross, 3 Bing. R., 329.

"The principle on which the law (of limitation as to debts) has always been based is either actual satisfaction, or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay." (Per Jessel, M. R., in Sutton *v.* Sutton, 22 Ch. Div., 511).

Many of the *subsidiary* reasons urged in support of the doctrine of prescription apply with full force to "prescription of *long* standing" only.

6. Phillimore's Private Roman Law, p. 126.

designs to protect these persons from claims brought forward against them at a period when it might be presumed from the lapes of time that the claims are either fictitious or that they had been satisfied or abandoned. Honest parties, who have not really abandoned their claims may sometimes suffer loss by reason of this law, but it is nevertheless expedient that the general good of the community should be purchased at the expense of some individual hardship. It is better perhaps that occasional injustice should be permitted than to run the risk of doing greater injustice by entering into the consideration of transactions, which the distance of time may perhaps render incapable of a satisfactory explanation.(7) This individual mischief is further justified on the ground that a party who is insensible to the value of civil remedies, and who, tacitly acquiescing in the conduct of his opponent, does not asserts his own claim with promptitude, has little or no right to require the aid of the State in enforcing it.(8) *Vigilantibus, non dormientibus jura subveniant.* The law assists the vigilant, not those who sleep over their rights. Lord Blackburn, in a recent case.(10) points out that this ground of acquiescence or laches is, often spoken of as if it

---

7. Per Richards, C. B., see Brown on Limitation, p. 12.

8. See Montriou's Institutes, p. 174 ; White *v.* Paruthers, 1 Knapp's Rep., 179 ; and Adam *v.* Earl of Sandwich, 2 Q. B. Div., 489.

"Although," as Puffendarf observes, "the *principal* aim of the law is *not* to punish men's defaults," the effect and consequence of this law is some times penal. This penal result is justified by a consideration of the laches and negligence of the claiment. The law avoids the greater of two evils, and sees that the lesser evil falls on the party who is himself to blame for it. It is not intended that persistence in wrong should engender a right or exempt the wrong-door from liability ; but it being expedient to protect all persons who have long enjoyed a right or an immunity, the law unavoidably protects some wrong-doors.

10. See Lord Blackburn's judgment in Dalton *v.* Angus (1881), 6 App. Cas., p. 818.

Wolf and Vattel advance similar *theories* of "a presumed *consent*" and "a *presumed abandonment*" to explain the loss of a right by lapse of time. (Vattel's Law of Nations, Bk. II, Chap. XI).

Justice West (citing Savigny and Pothier) says : "The law of prescription rests on a *presumption* that a right held for a certain time *without contest*, as against a person capable of contesting it, could not have been successfully contested." (Radhabai *v.* Anantrav, I. L. R., 9 Bom. 198, at pp. 225, 226).

were the *only* ground on which prescription was or could be founded.(9) But the weight of authority in England and in other systems of jurisprudence shows that the principle on which prescription is founded is *more extensive*.(10) No doubt it seems far less hard to say that enjoyment for a prescribed time shall bar the right-holder when he has been *guilty of laches*, than to say that he shall lose his right if he has not exercised it during the prescribed period, whether there has been laches or not. And it is both fair and expedient that there should be provisions to enlarge the time when the true owners are under disabilities, or for any other reason are not to be considered guilty of laches in not using their right within the specified period, and such provisions there were in the Roman Law, and commonly are in modern statutes of limitation. But the real policy and purpose of these laws (the quieting of disputes about titles and other matters of

---

9. See Mr. Justice Field's theory of Laches, note 2, *infra*.

As the King (according to an English law maxim) can be guilty of no laches, it followed from this theory of laches that the civil claims of the Crown, as well as all criminal prosecutions (which are always instituted in the name of the sovereign), might be commenced at any distance of time. Modern legislation has, however, largely qualified this rule (see Stephen's Commentaries, the Royal Prerogative). The law of limitation in this country even now, does not (with a few exceptions) apply to criminal prosecutions. (See The Queen *v.* Amir-ud-din, 15 W. R., 25 ; notes, p. 11, *supra* and notes under sec 6, Act XV of 1877, in the Appendix.) At the time of the passing of Act XV of 1877, the Law Member of the Governor-General's Council said : "A Limitation Act should certainly comprise rules as to the time of commencing prosecutions for the various offences under the Penal Code, and we should have inserted the necessary provisions as to this matter, had we not felt the need of consulting the Local Governments before making so important an addition to our law, and for this there was no time." It may be mentioned here that sec. 195 of the Criminal Procedure Code of 1882 prescribes a limitation of six months when a Court sanctions prosecution for an offence against public justice. In England, in the case of almost all offences punishable on *summary* conviction, the complaint must be made, or the information laid, within six months. (Calcutta Review for October 1886).

10. See Lord Blackburn's judgment in Dalton *v.* Angus (1881), 6 App. Cas., p. 818.

Wolf and Vattel advance similar *theories* of "a presumed *consent*" and "a *presumed abandonment*" to explain the loss of a right by lapse of time. (Vattel's Law of Nations, Bk. II, Chap. XI).

Justice West (citing Savigny and Pothier) says: "The law of prescription rests on a *presumption* that a right held for a certain time, *without contest*, as against a person capable of contesting it, could not have been successfully contested." (Radhabai *v.* Anantrav, I. L. R., 9 Bom. 198, at pp. 225, 226.)

right, for the public good) would be defeated, if there was to be a further enquiry as to whether there had been acquiescence on the part of the right-holder.(1) Whether the *theory* may be, their true foundation, in point of fact is *public utility and convenience*.(2)

---

1. See note 10, p. 28, *supra*.

2. See the judgments of the Lord Chancellor and of Lord Blackburn, and the opinion of Field, J., in Dalton *v.* Angus (1881), 6 App. Cas., 740. At page 756, Field J, says: "The foundation of a right upon mere long uninterrupted possession, as a matter of *public convenience*, is of very general application. Statutes of limitation have no other origin, and it is upon this principle that Story, J., in Tyler *v.* Wilkinson, puts rights of this kind" (prescriptive rights). In an earlier case, Adman *v.* Sandwich (1877). 2 Q. B Div., p. 485, Field, J., refers to the *theory* of these statutes in the following terms:—

"They all rest upon the broad and intelligible principle that persons who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to asserts their rights, slept upon them for so long a time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties." (But there are *other* reasons as well. See p. 29, *supra*). The learned Judge considered this theory of laches, in *construing* an *ambiguous* law of limitation, and held that it was not intended by the Legislature to apply to a case where the rightful owner had been guilty of no neglect or default. The language of the law in that case was fairly open to the construction put upon it See Lecture VI.

Mitra's Law of Limitation and Prescription—pp. 25 to 30.

APPENDIX II.

But another and far more important kind of incorporeal property is that which arises not from intellectual achievement, but from moral conduct If the reputation brought by mental actions which take the form of production, may fitly be regarded as incorporeal property, still more may the reputation brought by mental actions issuing in rectitude, truthfulness, sobriety, and good behaviour at large, which we call character; and if deprivation of the one is flagitious still more is deprivation of the other. Earned like other property be care, self-denial, perseverance, and similarly giving its owner facilities for gaining his ends and satisfying divers desires, the esteem of others is a possession, having analogies with possessions of a palpable nature. Indeed it has, like palpable possessions, a money value; since to be accounted honest is to be preferred as one with whom dealings may be safely carried on, and to lose character is to lose business. But apart from this effect, an estate in the general good-will appears to money of more worth than one in land. By some great action to have won golden opinions, may be a richer source of gratification than to have obtained bank-stock, or railway-shares. Hence, men who have invested their labour in noble deeds, and receive by way of interest the best wishes and cordeal greetings of society, may be considered as having claims to these rewards of virtue, resembling the claims of others to the rewards of industry. Of course this is true not only of those who are distinguished by unusual worth; it is true of all. To the degree in which each has legitimately gained a good repute, we must hold him entitled to it as a possession—a possession which, without quoting the hackneyed saying of Iago, may be held of more value than any other.

The chief way in which this product of good conduct differs from other mental products, is that though, like them, it may be taken away, it cannot be appropriated by the person who takes it away. This may, perhaps, be considered a reason for classing the interdict against injuring another's character as an interdict of negative beneficence rather than an interdict of justice: an illustration of the truth that the division of ethics into separate sections cannot, in all cases, be clearly maintained. Still, since a good reputation is acquired by actions carried on within the prescribed limits to actions, and is, indeed, partly a result of respect for those limits; and since one who destroys any or all of the good reputation so acquired, interferes with another's life in a way in which the other does not interfere with his life; it may be argued that the right to character is a corollary from the law of equal freedom. If

it be said that whoever is thus injured may (in some cases at least) retaliate on the injurer, as we see in recrimination, or, as among the vulgar, in the mutual calling of names; the reply is that, as shown in chapter VI, the law of equal freedom, rightly interpreted, does not permit exchange of injuries; and as it does not countenance physical retaliation neither does it countenance moral retaliation. So that though another's good character, when taken away, cannot be appropriated by the traducer, the taking of it away is still a breach of the law of equal freedom, in the same way destroying another's clothes, or setting fire to his house, is a breach.

Spencer, Justice—pp. 114 and 115.

APPENDIX II-A.

Section 70.—Of course with the right of free exchange goes the right of free contract: a postponement now understood now specified, in the completion of an exchange, serving to turn the one into the other.

It is needless to do more than name contracts for services on certain terms; contracts for the uses of houses and lands; contracts for the completion of specified works; contracts for the loan of capital. These are samples of contracts which men voluntarily enter into without agressing on any others—contracts, therefore, which they have a right to make.

In earlier times interferences with the right of exchange were of course accompanied by interferences with the right of contract. The multitudinous regulations of wages and prices, which century after century encumbered the statute books of civilised peoples, were examples. Decreasing with the decrease of coercive rule, these have, in our days, mostly disappeared. One such gradual change may be instanced as typifying others—that which usury laws furnish. In sundry cases where, but small progress towards free institutions had been made, the taking of interest for money lent was forbidden altogether; as among the Herbrews, as among ourselves in the remote past, and as among the French at the time of the greatest monarchical power. Then, as a qualification, we have the fixing of maximum rates; as in early ages by Cicero for his Roman province; as in England by Henry VIII at 10 per cent., by James I at 8 per cent., by Charles II at 6 per cent., by Anne at 5 per cent.; and as in France by Louis XV at 4 per cent. Finally we have removal of all restrictions, and the leaving of lenders and borrowers to make their own bargains.

While we observe that law has in this case gradually come into correspondence with equity, we may also fitly observe one exceptional case in which the two agree in forbidding a contract. I refer to the moral interdict and the legal interdict against a man's sale of himself into slavery. If we go back to the biological origin of justice, as being the maintenance of that relation between efforts and the products of efforts which is needful for the continuance of life, we see that this relation is suspended by bondage; and that, therefore, the man who agrees to enslave himself on condition of receiving some immediate benefit, traverses that ultimate principle from which social morality grows. Or if we contemplate the case from an immediately ethical point of view, it becomes manifest that since a contract, as framed in conformity with the law

of equal freedom, implies that the contracting parties shall severally give what are approximately equivalents, there can be no contract, properly so-called in which the terms are incommensurable ; as they are when, for some present enhancement of his life a man bargains away the rest of his life. So that when, instead of recognizing the sale of self as valid, law eventually interdicted it, the exception it thus made to the right of contract was an exception which equity also makes. Here, too, law harmonized itself with ethics

Spencer, Justice—pp. 129 to 131.

APPENDIX II-B.

Section 113.—And now, having reached these conclusions inductively, let us see whether corresponding conclusions cannot be reached deductively. Let us see whether from the natures of men as socially conditioned, it is not inferable that these to State-duties are the essential ones.

At the outset it was shown that the prosperity of a species is achieved by conformity to two opposite principles, appropriate to the young and to the adult respectively: benefits being inversely proportioned to worth in the one case and directly proportioned to worth in the other. Confining our attention to the last of these principles, which now alone concerns us, it is clear that maintenance of those conditions under each one's efforts bring their due rewards is, in the case of a society, liable to be traversed by external foes and by internal foes. The implication is that for the prosperity of a species, or in this case of a society, these conditions must be maintained by a due exercise of force; and for the exercise of such force the corporate action of the society is demanded—imperatively in the one case and with something approaching to imperativeness in the other. To such exercise of force, citizens at large (excluding criminals) have good reasons to assent. Observe their motives.

Such contingent loss of life and partial loss of liberty as are entailed on soldiers, and such deductions from their earnings as other citizens have to contribute to support soldiers, are left by each to be justified as instrumental to the supreme end of enabling him to carry on his activities and to retain the reward for them—sacrifice of a part to ensure the remainder. Hence he tacitly authorizes the required State-coercion.

Though the need for corporate guardianship against internal foes is less urgently felt, yet from the pursuit of his ends by each there arises a resultant desire for such guardianship. As in every community the relatively-strong are few, and the relatively-weak are many, it happens that in the majority of cases purely private rectification of wrongs is impracticable. If beyond the aid of family and friends, often inadequate, there can be obtained the aid of some one more powerful, it is worth buying—at first by a bribe, and presently by tribute. Eventually, all find it answer best to pay for security rather than suffer aggressions.

Thus these primary and secondary duties of the State are implied by those fundamental needs which associated men experience. They severally desire to live, to carry on their activities, and reap the benefits of them. All have motives to maintain against external enemies the conditions under which these ends may be achieved, and all, save aggressors of one or other kind, have motives to maintain these conditions against internal enemies. Hence at once the duty of the State and the authority of the State.

Spencer, Justice—pp. 206 to 209.

APPENDIX 12.

19. "Following Plato, Aristotle, and Holbes, not a few modern thinkers hold that there is no other origin for good and bad in conduct than law. They allege that rights are wholly results of convention: the necessary implication being that duties are so too. If however murders, thieving, non-fulfilment of contract, cheating, adultration, &c., &c, whether forbidden by law or not, work mischiefs on a community in proportion as they are common, quite irrespective of prohibitions; then, is it not manifest that the like holds throughout all the details of men's behaviour? Here, again, there is a theory betraying deficient consciousness of censation."

(Epetome S. Ph. of Spencer—p. 560.

APPENDIX 12-A.

Nor is it otherwise with the pure intuitionists, who hold that moral perceptions are innate in the original sense—thinkers whose view is that men have been divinely endowed with moral faculties; not that these have resulted from inherited modifications caused by accumulated experiences.

To affirm that we know some things to be right and other things to be wrong, by virtue of a supernaturally given conscience; and thus tacitly to affirm that we do not otherwise know right from wrong; is tacitly to deny any natural relations between acts and results. For if there exist any such relations, then we may ascertain by induction, or deduction, or both, what these are. And if it be admitted that because of such natural relations, hapiness is produced by this kind of conduct, which is therefore to be approved, while misery is produced by that kind of conduct, which is therefore to be condemned; then it is admitted that the rightness or wrongness of actions are determinable, and must finally be determined, by the goodness or badness of the effects that flow from them; which is contrary to the hypothesis.

It may, indeed, be rejoined that effects are deliberately ignored by this school; which teaches that courses recognized by moral intuition as right, must be pursued without regard to consequences. But on inquiry it turns out that the consequences to be disregarded are particular consequences, and not general consequences. When, for example, it is said that property lost by another ought to be restored irrespective of evil to the finder, who possibly may, by restoring it, lose that which would have preserved him from starvation; it is meant that in pursuance of the principle, the immediate and special consequences must be disregarded, not the diffused and remote consequences. By which we are shown that though the theory forbids overt recognition of causation there is an unavowed recognition of it.

And this implies the trait to which I am drawing attention. The conception of natural causation is so imperfectly developed, that there is only an indistinct consciousness that throughout the whole of human conduct, necessary relations of causes and effects prevail; and that from them are ultimately derived all moral rules, however much these may be proximately derived from moral intuitions.

Section 21.—Strange to say, even the utilitarian school, which, at first sight, appears to be distinguished from the rest by recognizing natural causation is, if not so far from complete recognition of it, yet very far.

Conduct, according to its theory, is to be estimated by observation of results. When, in sufficiently numerous cases, it has been found that behaviour of this kind works evil while behaviour of that kind works good, these kinds of behaviour are to be judged as wrong and right respectively. Now though it seems that the origin of moral rules in natural causes, is thus asserted by implication, it is but partially asserted. The implication is simply that we are to ascertain by induction that such and such mischiefs or benefits *do* go along with such and such acts; and are then to infer that the like relations will hold in future. But acceptance of these generalizations and the inferences from them, does not amount to recognition of causation in the full sense of the word. So long as only *some* relation between cause and effect in conduct is recognized, and not *the* relation, a completely-scientific form of knowledge has not been reached. At present, utilitarians pay no attention to this distinction. Even when it is pointed out, they disregard the fact that empirical utilitarianism is but a transitional form to be passed through on the way to rational utilitarianism.

In a letter to Mr. Mill, written some sixteen years ago, repudiating the title anti-utilitarian which he had applied to me (a letter subsequently published in Mr. Bain's work on *Mental and Moral Science*), I endeavoured to make clear the difference above indicated; and I must here quote certain passages from that letter.

The view for which I contend is, that Morality properly so-called—the science of right conduct—has for its object to determine *how* and *why* certain modes of conduct are detrimental, and certain others modes beneficial. These good and bad results cannot be accidental, but must be necessary consequences of the constitution of things and I conceive it to be the business of Moral Science to deduce, from the laws of life and the conditions of existence, what kinds of action necessarily tend to produce happiness, and what kinds to produce unhappiness. Having done this, its deductions are to be recognized as laws of conduct; and are to be conformed to irrespective of a direct estimation of happiness or misery.

Perhaps an analogy will most clearly show my meaning. During its early stages, planetary Astronomy consisted of nothing more than accumulated observations respecting the positions and motions of the sun and planets; from which accumulated observations it came by and by to be empirically predicted, with an approach to truth, that certain of the heavenly bodies would have certain positions at certain times. But the modern science of planetary Astronomy consists of deductions from the law of gravitation—deductions showing why the celestial bodies *necessarily* occupy certain places at certain times. Now, the kind of relation which thus exists between ancient and modern Astronomy is analogous to the kind of relation which, I conceive, exists between the Expendency-Morality and Moral Science properly so-called. And the objection which I have to the current Utilitarianism is, that it recognises no more developed form of Morality—does not see that it has reached but the initial stage of Moral Science

Doubtless if utilitarians are asked whether it can be by mere chance that this kind of action works evil and that works good, they will answer—No: they will admit that such sequences are parts of a necessary order among phenomena. But though this truth is beyond question; and though if there are causal relations between acts and their results, rules of conduct can become scientific only when they are deduced from these causal relations; there continues to be entire satisfaction with that form of utilitarianism in which these causal relations are practically ignored. It is supposed that in future, as now, utility is to be determined only by observation of results; and that there is no possibility of knowing by deduction from fundamental principles, what conduct *must* be detrimental and what conduct *must* be beneficial.

Section 22.—To make more specific that conception of ethical science here indicated, let me present it under a concrete aspect; beginning with a simple illustration and a complication this illustration by successive steps.

If, by tying its main artery, we stop most of the blood going to a limb, then, for as long as the limb performs its function, those parts which are called into play must be wasted faster than they are repaired: whence eventual disablement. The relation between due receipt of nutritive matters through its arteries, and due discharge of its duties by the limb, is a part of the physical order. If, instead of cutting off the supply to a particular limb, we bleed the patient largely, so drafting away the materials needed for repairing not one limb but all limbs and not limbs only but viscera, there results both a muscular debility and an enfeeblement of the vital functions. Here, again, cause and effect are necessarily related. The mischief that results from great depletion, results apart from any divine command, or political enactment, or moral intuition Now advance a step. Suppose the man to be prevented from taking in enough of the solid and liquid food containing those substances continually abstracted from his blood in repairing his tissues: suppose he has cancer of the œsophagus and cannot swallow—what happens? By this indirect depletion, as by direct depletion, he is inevitably made incapable of performing the actions of one in health. In this case, as in the other cases, the connexion between cause and effect is one that cannot be established, or altered, by any authority external to the phenomena themselves. Again, let us say that instead of being stopped after passing his mouth, that which he would swallow is stopped before reaching his mouth; so that day after day the man is required to waste his tissues in getting food, and day after day the food he has got to meet this waste, he is forcibly presented from eating. As before, the progress towards death by starvation is inevitable—the connexion between acts and effects is independent of any alleged theological or political authority. And similarly if, being forced by the whip to labour, no adequate return in food is supplied to him, there are equally certain evils, equally independent of sacred or secular enactment. Pass now to those actions more commonly thought of as the occasions for rules of conduct. Let us assume the man to be

continually robbed of that which was to given him in exchange for his labour and by which he was to make up for nervo-muscular expenditure and renew his powers. No less than before is the connexion between conduct and consequence rooted in the constitution of things; unchangeable by State-made law, and not needing establishment by empirical generalization. If the action by which the man is affected is a stage further away from the results, or produces results of a less decisive kind, still we see the same basis for morality in the physical order. Imagine that payment for his services is made partly in bad coin; or that it is delayed beyond the date agreed upon; or that what he buys to eat is adulterated with innutritive matter. Manifestly, by any of these deeds which we condemn as unjust, and which are punished by law, there is, as before, an interference with the normal adjustment of physiological repair to physiological waste Nor is it otherwise when we pass to kinds of conduct still more remotely operative. If he is hindered from enforcing his claim—if class-predominance prevents him from proceeding, or if a bribed judge gives a verdict contrary to evidence, or if a witness swears falsely; have not these deeds, though they affect him more indirectly, the same original cause for their wrongness? Even with actions which work diffused and indefinite mischiefs it is the same. Suppose that the man, instead of being dealt with fraudulently, is calumniated. There is, as before, a hindrance to the carrying on of life-sustaining activities; for the loss of character detrimentally affects his business. Nor is this all. The mental depression caused partially incapacitates him for energetic activity, and perhaps brings on ill-health. So that maliciously or carelessly propagating false statements, tends both to diminish his life and to diminish his ability to maintain life. Hence its flagitiousness. Moreover, if we trace to their ultimate ramifications the effects wrought by any of these acts which morality called intuitive reprobates—if we ask what results not to the individual himself only, but also to his belongings—if we observe how impoverishment hinders the rearing of his children, by entailing under-feeding or inadequate clothing, resulting perhaps in the death of some and the constitutional injury of others; we see that by the necessary connections of things these acts, besides tending primarily to lower the life of the individual aggressed upon, tend, secondarily, to lower the lives of all his family, and, thirdly to lower the life of society at large; which is damaged by whatever damages its units.

A more distinct meaning will now be seen in the statement that the utilitarianism which recognizes only the principles of conduct reached by induction, is but preparatory to the utilitarianism which deduces these principles from the processes of life as carried on under established conditions of existence.

S. 22.—Thus then, is justified the allegation made at the outset, that, irrespective of their distinctive characters and their special tendencies, all the current methods of ethics have one general defect—they neglect ultimate causal

connexions. Of course I do not mean that they wholly ignore the natural consequences of actions; but I mean that they recognize them only incidentally. They do not erect into a method the ascertaining of necessary relations between causes and effects, and deducing rules of conduct from formulated statements of them.

Every science begins by accumulating observations, and presently generalizes these empirically; but only when it reaches the stage at which its empirical generalizations are included in a rational generalization, does it become developed science. Astronomy has already passed through its successive stages; first collections of facts; then inductions from them; and lastly deductive interpretations of these, as corolaries from a universal principle of action among masses in space. Accounts of structures and tabulations of strata, grouped and compared, have led gradually to the assigning of various classes of geological changes to igneous and aqueous actions; and it is now tacitly admitted that Geology becomes a science proper, only as fast as such changes are explained in terms of those natural processes which have arisen in the cooling and solidifying Earth, exposed to the Sun's heat and the action of the Moon upon its ocean. The science of life has been, and is still, exhibiting a like series of steps: the evolution of organic forms at large, is being affiliated on physical actions in operation from the beginning; and the vital phenomena each organism presents, are coming to be understood as connected sets are changes, in parts formed of matters that are affected by certain forces and disengage other forces. So is it with mind. Early ideas concerning thought and feeling ignored everything like cause, save in recognizing those effects of habit which were forced on men's attention and expressed in proverbs; but there are growing up interpretations of thought and feeling as correlates of the actions and re-actions of a nervous structures that is influenced by outer changes and works in the body adapted changes; the implication being that Psychology becomes a science, as fast as these relations of phenomena are explained as consequences of ultimate principles. Sociology, too, represented down to recent times only by stray ideas about social organization, scattered through the masses of worthless gossip furnished us by historians, is coming to be recognized by some as also a science; and such adumbrations of it as have from time to time appeared in the shape of empirical generalizations, are now beginning to assume the character of generalizations made coherent by derivation from causes lying in human nature placed under given conditions. Clearly then, Ethics, which is a science dealing with the conduct of associated human beings, regarded under one of its aspects, has to undergo a like transformation; and, at present undeveloped, can be considered a developed science only when it has undergone this transformation.

The Data of Ethics, Herbert Spencer, pp. 55—62.

APPENDIX 13.

Having premised these brief explanations, I proceed to the *just gentium* of Roman origin, or of the Roman lawyers who preceded the Classical Jurists.

According to the Roman Law, a member of an independent nation, not in *alliance* with the Roman people, had no rights as against Romans, or as between himself and other foreigners or aliens. And even a member of an independent nation, the *ally of the Roman People*, had no rights (as against Romans or foreigners), except the rights conferred on members of that nation by the provisions of the *fœdus* or alliance.

When I say that the members of an independent nation, *not in alliance with the Roman People*, had no rights as against Romans or foreigners, I understand the proposition with limitations.

When a member of any such nation *was residing in the Roman territory*, it is probable that his person was protected from violance and insult: And, although he was incapable of acquiring by transfer or succession, or of suing upon any contract into which he had affected to enter, goods actually in his possession were probably *his* goods, as against *all* who could shew no title whatever. Unless we understand the proposition with these limitations, a *peregrinus* or alien not a *socius* or ally of the Roman People was obnoxious to murder and spoliation at every instant, when dwelling on Roman soil.

In short, the condition of such an alien, *when residing on the Roman territory*, probably resembled the condition of an alien *enemy*, living within the ligeance of our own King. The latter is protected from bodily harm and spoliation, although he is generally incapable of suing in the Courts of Justice, and although it is said (in loose language) that he has *no* rights.

I believe it is now usual, on the breaking out of a war, for the King to grant a special permission to the enemy's subjects to reside in the country; and under the permission they have the same rights as alien friends. But Lord Coke lays it down positively, that an alien enemy has no rights; by which it can only be meant that he has not the right of suing in our courts, just as a person outlawed is commonly said to carry *caput lupinum*, although there is no doubt that to kill him intentionally would be murdur.

But, taking the proposition with the limitations which I have just suggested, the members of an independent nation, not in positive alliance with the Roman People, had no rights, which the Roman Tribunals would enforce. For

although they were not *positively* enemies of the Roman People, neither were they positively its allies or friends. And, agreeably to the maxim which prevailed in every nation of antiquity, they were therefore considered by the Roman Law as not existing

This unsocial maxim (of which there are vestiges even in Modern Europe) obtained in the Roman Law from the very foundation of the city to the age of Justinian. It is laid down broadly in an excerpt in the Pandects, 'that every people, not in alliance with *us*, keep everything of *ours* which they can contrive to take; whilst *we*, in return, appropriate everything of theirs which happens to fall into our hands.' 'Si cum gente aliqua neque amicitiam, neque hospitium, neque *fœdus amicitiæ causa factum* habemus, hi *hostes* quidem non sunt. Quod autem ex *nostro* ad eos pervenit, illorum fit; et liber homo *noster* ab eis captus servus fit *eorum*. Idem que est, si ab *illis* ad *nos* aliquid perveniat.'

It may therefore be affirmed generally, that, according to the Roman Law (and according to the law of every nation of antiquity), the members of a foreign and independent community had no Rights: Rights which they might have acquired by virtue of any positive alliance, being created specially by the provisions of the particular treaty, and by way of exception from the exclusive and general maxim.

From the *pure peregrini* or aliens (or from members of *foreign* and *independent* nations), I turn to the members of the communities which formerly had been independent, but which had been subdued by the Roman arms, and brought into a state of subjection to the Roman Commonwealth.

The members of an independent community subdued by the Roman arms, were placed in a peculiar position. They were not admitted to the rights of Roman Citizens, nor were they reduced to the servile condition and stripped of *all* rights. Generally speaking, they retained their ancient Government and their ancient laws, so far as the continuance of those institutions consisted with a state of subjection to the Roman Commonwealth.

It is clearly laid down in the Digests, that, unless the sovereign legislature has specifically directed the contrary, the judge shall consult, in the first instance, the law peculiar to the particular region: And that the Law of Rome itself ('jus quo urbs Roma utitur') shall not be applied to the case which awaits decision, unless the law peculiar to the particular region shall afford no solution of the legal difficulty.

Such being the condition of the conquered and subject nations, the following difficulties inevitably arose.

Inasmuch as those conquered and subject nations were not incorporated with the conquering and sovereign community, their members had no rights as against Roman Citizens, according to the ancient and strict law obtaining in Rome itself.

For, during the period in which that law arose, those conquered and subject nations were foreign and independent societies; and agreeably to the unsocial maxim which I have already explained, their members had no rights which the Roman tribunals would enforce.

And, agreeably to the same maxim, members of one of those nations had no rights as against members of another. For, although those nations were now subject to their common sovereign, Rome, they had been foreign and independent nations, *with reference to one another*, as well as with reference to the dominant nation which had beaten and subdued them all. In consequence, therefore, of the maxim to which I have alluded, the law peculiar to any of those subject nations imparted no rights to the members of another community.

Consequently, whenever a controversy arose between a Roman and a Provincial, or between a provincial of one and a provincial of another Province, there was no law applicable to the case, and the party who had suffered the damage was left without redress. As between Romans and provincials, or as between provincials of one and provincials of another Province, the Roman Law afforded no remedy. For the Roman Law acknowledged no rights in any but Roman Citizens.

In either of the same cases, the particular law of any particular Province was equally inefficacious. For the people of the Province had been an independent community; whose law (like that of Rome) acknowledged no rights in any but its own members.

To meet such cases, there was a manifest necessity for a system of rules which should embrace all the nations composing the Roman Empire: which should serve as a *supplement* or *subsidium* to the Law of Rome itself, and to each of the various systems of provincial law obtaining in the conquered territory.

The obvious and urgent want was supplied in the following manner:—

In the earliar ages of Rome, and before she had extended her empire beyond the bounds of Italy, the inconvenience which I have tried to explain inevitably arose, in consequence of the unsocial character of the old Roman law, and of the equally exclusive character of the various systems of law obtaining in the Italian States which the Roman people had subdued. Accordingly, in addition to the ancient Prætor (who judged in civil questions between Roman Citizens, and agreeably to the law peculiar to the *Urbs Roma*), a Prætor was appointed to determine the civil cases which arose from the relations between the victorious republic and the subject or dependent communities.

This new Magistrate (who raised in Rome itself, but who seems to have made periodical circuits through the conquered States of Italy) exercised civil jurisdiction in the following cases: namely—1st, in all questions or controversies

between Roman citizens and members of the Italian States which were vassals and dependents of the Roman people; 2ndly, between members of any one of these vassal states and members of any other; 3rdly, between members of subject states when residing in Rome itself; which might be considered as a distinct class of questions, because if the parties were members of the same community, the dispute was properly decided by the law of that community.

This new magistrate was styled '*Prætor Peregrinus*:' Not because his jurisdiction was *restricted* to questions *between foreigners*; but because the questions, over which his jurisdiction extended, arose *more frequently* between foreigners and foreigners than between foreigners and Roman Citizens: 'Quod *plerumque* inter peregrinos jus dicebat'

In the strict sense of the term *Peregrinus*, the parties, whose causes he commonly determined, were not *peregrini*, or foreigners, but friends and vassals of Rome. But since they *had been* foreigners before their subjection to Rome, and had not been admitted afterwards to the rights of Romans, they were still entitled *peregrini* or foreigners (as distinguished from *Cives* or Roman Citizens).

As I have remarked already, it is not probable that a foreigner (in the strict acceptation of the term) could regularly maintain a civil action before any of the Roman Tribunals.

After the appointment of the *Pætor Peregrinus*, the ancient and ordinary Prætor was styled (by way of distinction) Pætor *Urbanus*: Partly because his tribunal was immovably fixed at Rome, and partly because he decided between Roman and Romans, agreeably to the peculiar law of their own pre-eminent City.

From the appointment of the *Prætor Peregrinus*, and the causes which led to the creation of his new and extraordinary office, I proceed to the law which he administered.

In questions between foreigners and Romans, and between foreigners of different dependent States, the *first* Prætor Peregrinus must have begun with judging arbitrarily. For neither the law of Rome herself, nor the law obtaining in any of the vassals nations, afforded a body of rules by which such questions could be solved.

But a body of subsidiary law, applicable to such questions, was gradually established by the successive *Edicts* which he and his successors (imitating the *Prætores Urbani*) emitted on their accession to office. This subsidiary law, thus established by the Foreign Prætors, was probably framed, in part, upon general considerations of general utility. But, in the main, it seems to have been an *abstractum* (gathered by comparison and induction) from the peculiar Law of Rome herself, and the various peculiar systems of the subject or dependent nations.

Perpetually engaged in judging between foreigners and citizens of Rome, *and* between foreigners of *different* dependent States, these magistrates were led to compare the several systems of law which obtained in the several communities composing the Roman *Empire*. And, comparing the several systems obtaining in those several communities, they naturally extracted from those several systems, a system of a liberal character ; free from the narrow peculiarities of each particular system, and meeting the common necessities of the entire Roman World.

This body of law, thus introduced by successive edicts, acquired the name of *jus gentium*, and this was the meaning originally annexed to that ambiguous and obscure expression.

It probably acquired this name for one of the following reasons :—*First*, as extending to all communities (including Rome itself) which formed part of the Roman Empire, it was properly *jus gentium* or *jus omnium gentium*, as opposed to the law peculiar to Rome and contradistinguished from the law of a single dependent State. This is the likeliest origin of the expression. *Secondly*, though applied between Romans and foreigners, as well as between members of different foreign States, the questions or controversies, which it was framed to meet, naturally arose *plerumque inter peregrinos ;* but *peregrini* or foreigners when contradistinguished from *Romani cives*, or frequently stayled *gentes*. Thus, Cives and gentes,—Jews and gentiles,—" ....,—express distinctions precisely similar; they denote persons other than the countrymen of the person employing them, as opposed to his own countrymen. *Jus gentium*, therefore, does not denote law obtaining universally or generally, but law conversant about *gentes* or foreigners—namely, those foreigners who were subjects of the Roman People and with whom it was most concerned.

Extending to all the nations, which composed the Roman Empire, and not being peculiar to one community, it was also entitled *jus æquabile*, *jus æquum* or *æquitas*, that is, universal or general law as opposed to partial or particular. Nothing can be homelier than the origin of the term equity, or less related to the jargon in which it has subsequently been involved. But instead of denoting this universal or equable law, *æquitas* sometimes denoted conformity to that law ; as *justitia* denoted conformity to *jus*. Since the law denoted by the term equity, or the law conformity to which was denoted by the term equity, was a law of an impartial or liberal character, equity came by a natural transference of signification, to mean fairness. It was consequently used by every innovating judge, who sought to cover his innovations by a specious and imposing name ; and by this obvious and effectual artifice, the term was extended from the law established by the *praetores peregrini*, to the law created by the ordinary prætors, and by our own chancellors.

After the dominion of Rome had extended beyond Italy, the *subsidiary* Law introduced into *Italy* by the edicts of the *Praetores peregrini*, was adopted

and improved by the Edicts of the various Roman Governors, who (under the various names of Proconsuls, Prætors, Proprætors, or Presidents) represented the Roman People *in the outlying Provinces.*

For the governors of these outlying provinces (like the Prætor Peregrinus, whose jurisdiction was confined to Italy, and like the proper magistrates of the Roman People) were tacitly or expressly authorised to legislate, as well as to judge; 'jus edicere' as well as 'dicere.'

As between Provincials of his own province, the governor of an outlying province regularly administered the law which had obtained in the province before its subjection to Rome. As between Romans and Romans residing within his province, he regularly administered the law peculiar to Rome herself. But neither the peculiar law of his own province, nor the peculiar law of Rome (in its old and unsocial form), would apply to civil cases between Romans and Provincials or between Provincials of different provinces.

In questions, therefore, between Roman Citizens and Provincials, or between Provincials residing in his province *(but belonging to different provinces)*, he administered the subsidiary law created by the *Prætores Peregrini*, or a similar subsidiary law created by himself or his predecessors. Consequently, *before* and *after* the dominion of Rome had extended beyond Italy, a law was administerd in Italy (by the *Prætores Peregrini)* in aid of the law peculiar to Rome herself, or to any of the Italian communities which Rome had subdued. *After* the dominion of Rome had extended beyond Italy, the same or a similar law was administered in the outlying provinces (by their respective Presidents or Governors), in aid of the law peculiar to Rome herself, or of the law obtaining in any of those provinces before its subjection to the conquering City. And this subsidiary law, thus administered in Italy and in the outlying provinces, was applied to civil questions between citizens of Rome and members of the nations subject to Rome, or between members of any of those nations and members of any other.

Since the want which led to the creation of this subsidiary law was the same in Italy and the outlying Provinces, and since all its immediate authors were representatives of the some sovereign, it naturally was nearly uniform throughout the Roman World, notwithstanding the multiplicity of its sources. The Presidents of the outlying provinces naturally borrowed from the Edicts of *Prætores Peregrini*; and the *Prætores Peregrini* as naturally adopted the improvements which the Edicts of those Presidents introduced.

As distinguished from the system of law which was *peculiar* to Rome herself, and also from the systems of law which were respectively *peculiar* to the subject or dependent communities, this subsidiary law was styled *jus gentium*, or *jus omnium gentium:* the law of *all* the nations (including the conquering and sovereign nation) which composed the Roman World. As being the law *common* to these

various nations, or administered *equally* or *universally* to members of these various nations, it was also styled *jus aequum, jus æquabile, æquitas:* Though the term '*aequitas*' seems to have denoted properly, not this common or equal law, but *conformity or consonance to* this common or equal law; as the more extensive but analogous term *justitia* signifies conformity or consonance to any *jus* or *law* of any kind or sort. And the *jus gentium* which I have now attempted to describe, was the only *jus gentium* that was known to the Roman Law, till the *jus gentium* or *naturale*, which occurs in Justinian's compilations, was imported into it, by the jurists who are styled Classical, from speculations of Greek Philosophers on Law and Morals.

Originally, the *jus gentium* which I have attempted to describe, was not parcel of the *proper* Roman Law, or the law *peculiar* to Rome herself.

But the first arose in an age comparatively enlightened, and was a product of large experience; whilst the last had arisen in an age comparatively barbarous, and was a product of narrow experience The *jus gentium*, therefore, was so conspicuously *better* than the proper Roman Law that naturally it gradually passed into the latter; or became incorporated with the latter.

It influenced the legislation of the *Populus*, *Plebs*, and Senate; it influenced the opinions held and emitted by the *Prudentes*; and (above all) it served as a pattern to the *Praetores Urbani*, in the large and frequent innovations which they made by their general edicts, upon the old, rude, and incommodious law peculiar to the *Urbs Roma*.

So much indeed of the *jus gentium* passed into the *jus praetorium* (or the law which the *Prætores Urbani* created by their general edicts), that one of the names given to the latter was probably transferred to it from the former. It probably was named *aequitas* (or *jus aequum*) after that *aequal* or *common* law, from which it had borrowed the bulk or a large portion of its provisions.

The law formed by the Edicts of the *Praetores Urbani* (or the Prætors who sat immovably in the *Urbs Roma*, and administered justice between Roman Citizens) was commonly called *jus prætorium* But having borrowed largely from the *jus gentium*, it was also styled, like the *jus gentium*, '*aequitas*:' A name which was extended to it the rather, for this reason:—that *aequitas* had become synonymous with *general utility*; and that the *jus praetorium* (when contrasted with the old law, to which it was a corrective and supplement) was distinguished by a spirit of impartiality or fairness, or by its regard for the interests of the weak as well as for the interests of the strong: *e.g.*, It enlarged the rights of women: gave to the *filius familias* rights against the father; to the members of the subject States rights against Roman citizens.

Now after the incorporation of the *jus gentium* with the proper Law of the *Urbs Roma*, the latter was distinguishable, and was often distinguished, into two portions—namely, the *jus gentium* which had been incorporated with it, and that remnant of the older law which the *jus gentium* had not superseded. As being proper or peculiar to the City of Rome, this remnant of the older law (when contradistinguished from the *jus gentium*) was styled *jus civile*; that is to say, the proper or peculiar Law of that *Civitas* or Independent State. Though (as I shall shew hereafter) *jus civile* (taken in a larger meaning) included the *whole* of the Roman Law: the *jus gentium* which it had borrowed, as well as the *jus civile* (taking the expression in the narrower meaning) upon which the *jus gentium* had been superinduced.

This distinction between *jus civile et gentium* (as denoting different portions of the more recent Roman Law) nearly tallied with the distinction between *jus civile et prætorium*. For first; Though much of the *jus Prætorium* (or the law introduced by the edicts of the *Praetores Urbani*) was not suggested to its authors by the *jus gentium*, *most* of it was naturally formed upon the model or pattern which that *jus æquum* presented to imitation.

Secondly; although the incorporation of the latter with the Law of the *Urbs Roma*, was partly accomplished by acts of the *Populus*, *Plebs* and Senate, still it was principally effected through the edicts of the *Urban Prætors*: By whom (as I shall shew in a future Lecture) the business of Civil Legislation was mainly carried on.

Now as most of the *jus praetorium* consisted of *jus gentium*, and as most of the *jus gentium* (imported into the Roman Law) was imported by the edicts of those Prætors, it is not wonderful or remarkable (considering the clumsy manner in which language is usually constructed) that *jus prætorium* and *jus gentium* were considered synonymous expression:—that the distinction between *jus civile et jus gentium*, and the distinction between *jus civile et jus praetorium* were considered as equivalent distinctions (although, in truth, they were disparate).

And (for the same reason) the extension of the term (*aequitas*) was restricted to the *jus praetorium*; though the term *might* have been extended to a *lex*, or a *Senatus-consultum* which had borrowed its provisions or principle from the *jus gentium*.

The *jus gentium* therefore of the earliar Roman Lawyers, was the common law of the community composing the Roman world, as contradistinguished to the particular systems which were respectively peculiar to those several communities or *gentes*.

But in consequence of this incorporation of the *jus gentium* with the law peculiar to the *Urbs Roma*, the *jus gentium*, as a separate system, eventually

disappeared. For the proper Roman Law, having adopted and absorbed it, became applicable to the cases which it had been made to meet: That is to say, to civil questions between Citizens of Rome and members of the communities which Rome had subdued, or between members of any of those communities and members of any other. And, by consequence, the office of the *Praetor Peregrinus* thereafter fell into disuse; and the Edicts of the Presidents in the various provinces were thereafter exclusively occupied with purely provincial interests.

The Roman Law having absorbed the *jus gentium*, and tending in every direction to universality, had now put off much of its exclusive character. Although that older portion of it, which was marked with the distinctive name of *jus civile*, was still the peculiar law of Roman Citizens, much of the later law introduced by the people and Senate, and more of the law established by the Urban Prætors, was adapted to the common necessities of the entire Roman world Hence the Law of the *Urbs Roma* (though originally the peculiar law of the dominant City) was applied (in *subsidium*) to cases between Provincials, although the contending parties were members of the same province, and were actually within the jurisdiction of its peculiar tribunal. Owing to the character of universality which it thus acquired, and which was afterwards heightened by the labours of the Classical Jurists, the Roman Law (though the law of a single people living in a remote age) has obtained as auxiliary law in the nations of Modern Europe, or has been incorporated with their own peculiar systems.

Austin, vol. II—pp. 569 to 579.

APPENDIX 13-A.

437. From the earliest times the Roman creditor never seems to have thought of relying solely on the good faith or ability of his debtor for the satisfaction of his demand. By the nexum, the oldest form of contract, the debtor was handed over bodily to the creditor, becoming, in fact, his slave; and it was no easy matter for the debtor to escape from his obligation. Upon entering into the nexum he had to procure six fellow citizens as witnesses to, and assistants in the formalities of the transaction. This gave strength and precision to the obligation. But the presence of these witnesses was in later times further utilised in a way which ultimately led to a great advance in the law. By means of the other ancient form of contract, the sponsio, it was easy to secure the concurrent engagement of these six persons, in addition to that of the principal; debtor, that the obligation should be performed, so that, in case of the failure of the latter, the creditor might have recourse to them.

438. It will be observed that the creditor was thus to some extent secured not only against the unwillingness but against the inability of his debtor. Still the prevailing idea was that of pressure brought to bear upon the will of the contracting party; of some inconvenience to be suffered if the engagement were not fulfilled; and this was quite consonant to the spirit of the old Roman law. But it did not long suffice for all the wants of a busy practical people. What was wanted by creditors was a tangible means of obtaining satisfaction for their claims wholly independent of the will of the debtor. This was actually obtained, though only after a very long struggle. The creditor at length got what is called *real* security; that is to say, he got, not only the promise of the debtor and a means of compelling him to fulfil that promise, but he also got a right over a specific thing which ensured to him the performance of the promise, quite independently of the wishes or ability of the debtor; so that at last not only the will of the debtor, but even the debtor himself was so little regarded that, in the latest period, it almost seemed as if the thing which was made security was treated as the debtor, and not the original party to the obligation. The progress of the Roman law from a simple pressure upon the will of the debtor to this its ultimate development is in the highest degree interesting.

439. The first advance upon the nexum and sponsio was the transaction called fiducia. This was a formal proceeding, suitable to any case in which it was desired to transfer to another a specific thing under conditions. It therefore was not confined to the taking of security, but was also used in cases of deposit or loan. Ultimately, however, it came specially to signify the taking of security.

440. In the transaction of fiducia the various conditions upon which the thing was to be returned were defined by the contract under which it was transferred. If it was a case in which security was to be given, the creditor got the debtor to make over to him the full ownership of the thing, binding himself to return it as soon as the obligation was fulfilled. This was an easy and effectual way of obtaining security, and it remained in use even after the introduction of the other modes which will be hereafter described; indeed, it was well known to the western world, at least in Italy, up the time of the Christian Emperors. It was, in fact, a proceeding similar to an English mortgage, but without a power of sale or foreclosure.

441. There were, however, many things, which were in every way suitable to be used as security for the performance of an obligation, but to which, on account of certain well known difficulties, the proceeding by way of fiducia was inapplicable.(1) I need not enter at length into the nature of these difficulties; they were no doubt technical, but were too deeply rooted to be swept away for a special purpose without destroying the symmetry (elegantia) of the law, and thus causing confusion. The Roman lawyers, therefore, introduced another proceeding called pignus, the effect of which was to get rid of the transfer of ownership altogether, and to substitute for it a transfer to the creditor of the bare possession, of course under the same condition as to its return, when the debt was satisfied.

442. In both these processes, however, there were inherent defects. In the case of fiducia the debtor was dependent on the good faith of the creditor for the restoration of his property, for if the creditor had parted with it, he had only a personal remedy against him; on the other hand, the creditor could not consistently with his contract obtain any material satisfaction out of the thing transferred to him, which was, perhaps, not even in his possession. So, in the case of pignus, the creditor was exposed to the risk of the property being sold by the debtor to a third person in fraud of his security; in which case, if the thing pledged were land, the creditor was wholly unprotected against this third person's claim(2).

---

1. Either a mancipatio or an injure cessio seems to have been necessary to bring back the property, and I should suppose also to convey it, in the first instance, to the creditor. See Smith's Dict. Antiqq., s. v. *Fiducia*.

2. It was this inapplicability of pignus in its original form to land, combined with the false etymology of the term (a pugno), which led to the saying that pignus properly (proprie) could only be given of moveable property. This has misled Story (Bailments, sec. 286), who translates proprie 'generally,' and seems to think that the distinction between pignus and hypotheca was a fundamental one, though occasionally lost sight of: the truth being that it was one of little importance and very rarely noticed. In later times a pignus in which the possession was not transferred, and a pignus of land, were every-day transactions.

Indeed this defect was so serious that, until it was removed, land was very rarely given in pignus. The pignus too, like fiducia, produced no material satisfaction of the claim, but only a pressure upon the will of the debtor, arising from the inconvenience of being kept out of his property. So far, therefore, the law was still under the dominion of the idea that it was the will of the debtor which was to be acted upon.

443. The most important improvements in the Roman law of security were not introduced until, by the extension of the Roman dominion beyond the confines of Italy, very large estates first became common. From this time large numbers of slaves and even of free persons(1) began to be employed in cultivating these properties. Small estates also were sometimes let out to farm. Hence the necessity that the landlord should have some security for his rent became apparent at Rome, as it has in all places where the land of one person is cultivated by another.

444. Under the old law it was not easy for the landlord to obtain this security from the cultivator. Generally the only property which the cultivator had was his farming stock (invecta et illata); and it was obvious that this could neither be assigned to the landlord by a fiducia, nor given into his custody by a pignus. It was therefore necessary to devise some other means of effecting security and the mode adopted was, to allow the tenant, by a simple agreement, without any formalities, to pledge his farming stock to his landlord as a security for the rent. The validity of such an agreement was first recognised by a praetor of the name of Salvius, who thus led the way to the most important changes in the law of security. The property of the tenant could be followed, if it had been removed by him off the farm in fraud of his agreement with his landlord. At first, however, this could only be done within very short periods of time after the removal If the property were still in the hands of the tenant, the landlord could have it brought back within the year If it had passed into the hands of a third person, then it could not be pursued, if the latter had held it either for a year, or, at least, for as long a time as it had been upon the land of the tenant. This strict rule of limitation, however, was considered to make the security too perilous; and another praetor, named Servius, removed this limitation, and gave to the landlord the ordinary time to sue for and recover the thing alienated.

445. These provisions did not long remain confined to the claims of landowners. The Servian action, by which the thing pledged could be followed into

---

1. This is Prof. Kuntze's statement. Sir Henry Maine is of opinion that there were no free cultivators (Ancient Law, first ed., p. 299). But see Plin. Ep. iii. 19; and for an account of the colonus see Kuntze, Excursus, p. 299. See also Phil. Mus. 2. 117.

the hands of any person to whom it came, was extended to all kinds of property, and to security for all kinds of claims. Thus an entirely new kind of right was created, a jus in re aliená available against the world at large: and this right could be acquired by means of a simple agreement without any special formality.

446. This form of security was called by the Greek name hypotheca, and it was probably of Greek origin, being copied by the Romans from the Greeks of southern Italy, where they had become familiar with it. It was only a development of the original pignus, although it was at the same time a very considerable advance upon it; and the Roman law did not henceforth keep up any distinction between pignus and hypotheca. Whether the possession was actually transferred or not, the agreement by one man that his property should be a security to another was in later times called indifferently hypotheca or pignus.

447. Still we have not reached the point aimed at. Though the creditor had what has been called a real right(1), but which is better called a jus in re, he had no real security. He could assert that the thing pledge to him remained subject to the pledge wherever it happened to be, but he had no means in his own hands of satisfying his claim if the debtor neglected to do what he ought. This had yet to be provided for, and the mode of doing so was suggested by an ancient rule of the Roman law, that in the case of land pledged to the state (*praedia*), the state could sell the property and satisfy its own debt. It became customary for private creditors to stipulate for a similar right; and this right of sale, coupled with the rights conferred by the pignus, or hypotheca, gave to the creditor the means of satisfying his claim, and rendered him entirely independent of the debtor. It was necessary at first for the creditor to obtain the right of sale by a special concession, but in later times it was always presumed to exist. Indeed, the law went even a step further. A positive agreement by the creditor not to sell had only the effect of rendering three several notices to the debtor necessary, instead of the single one which would otherwise suffice.

448. These were the steps by which the law was developed in the case of pignus and hypotheca. In the case of fiducia the result was the same, though the method of arriving at it was different; there the ownership was already transferred to the creditor; and the most obvious course in the case of the debtor's failure was by express agreement to make the creditor's ownership absolute. Indeed, this could at one time be done. But as soon as the right of the creditor in the case of pignus to sell and satisfy the debt was fully established, the right to do this was attributed to the creditor in the case of fiducia also; and thenceforth the

1. The term 'real right' to English ears means a right over land as opposed to 'personal right.' That is the reason why the expression is objectionable. Where chattels are given as a security there is equally a jus in re.

clause of forfeiture(1) or foreclosure fell into disuse, a sale by the creditor being in every respect more in accordance with the spirit of the law as administered under the Christian Emperors than a foreclosure.

449. Henceforth the right to sell and satisfy the debt (*distractio*) came to be considered as the very essence of the law of security. The person in whose favour the security was given always had this right ; and therefore, as a pledge might in all cases result in a sale, nothing could be pledged which could not be sold. Subject to this, however, everything which we should call property might be given as a security ; any beneficial right to the use or enjoyment of land, and even easements might be so dealt with ; the only test appearing to be whether it was possible for the creditor to extract from the thing pledged satisfaction of his demand. Debts due to the debtor could be given as a security ; the creditor being able to obtain satisfaction by causing payment to be made to himself, or by selling the debt to a third person.

450. So too a creditor could give the thing pledged as a security for a debt of his own ; but subject, of course, to the rights of the original pledgee. If therefore the original debt was paid off, the second pledgee lost his security ; but he could prevent this by giving to the original creditor a proper notice.

451. I pass over the rules which relate to the constitution of several pledges for one demand, and successive pledges of the same thing for several demands, and I proceed now to state more particularly the nature of a security under the Roman law, and the position of the debtor and creditor after it has been given.

452. The particular nature of the obligation of which the performance was to be secured was immaterial, and a security might be given for the whole of a debt or for a part. It was also of no consequence whether the debtor himself gave the security, or some one else for him(2). A pledge might even be given for a claim which could not be enforced by law, such as a mere debt of honour, or a moral duty. A security also, like an obligation, could be conditional or future.

453. Giving a thing in pledge did not prevent the owner dealing with it as he thought proper, provided that he did not interfere with, or lessen, the security of his creditor. Any dealings which would have that effect were null and void

---

1. This clause in the agreement was called lex commissioria. It was declared by Constantine to be illegal ; Smith's Dict. Antiqq. s. v. *Pignus*. But the creditor might still agree to purchase at a fair price. See Windscheid, Lehrbuch des Pandekten Rechts, sect. 238.

2. There was, of course, the limitation above referred to (sect. 432 note) that the security could only produce money to the creditor in satisfaction of his claim.

as against the purchaser from the creditor, should the latter exercise his right of sale. But in the case of moveable property the pledgor was not allowed to alienate it without the consent of the pledgee; the alienation was not absolutely void, but the pledgor was personally liable as for a misappropriation, and of course such a sale did not displace the creditor's security.

454. The use and profits of a thing given as security belonged entirely to the pledgor, unless it were expressly agreed to the contrary. If the pledgee were in possession, then he was bound to make as good a profit as he could out of everything from which his debtor had made a profit, being responsible for not doing so. It was only where there was a loan of money, and no agreement at all about interest, that the creditor in possession of a security could take the profits himself, and then he could do so only to the extent of a moderate rate of interest; of course he could not take them if interest had been expressly excluded. Sometimes the parties expressly agreed that the whole profits should be taken in lieu of interest and this was allowed.

455. The Roman law recognised to some extent the principal of what English lawyers call 'tacking'. If the creditor had any other claims for money in writing against the debtor, he could retain possession of the security, notwithstanding that the debt for which it had been originally given was satisfied, whether these other claims were created before or after the security was given. But, as far as I am aware, the unjust rule of English law, that the first creditor has a priority over a subsequent pledgee even in respect of unsecured debts, was never adopted(1).

456. Of course the right to sell the thing pledged and satisfy the debt was the most important of all the rights of a secured creditor. This right could not be exercised until the debt was actually due and notice had been given to pay it. The sale was conducted by the creditor, who was looked upon as an agent of the debtor. Not that agency is, strictly speaking, the legal ground of the transaction; the creditor, when selling, acted in his own right; but the creditor was so far an agent that he had specific duties to perform in order to protect the interests of the debtor when the security was brought to sale. For instance, it was his duty to advertise the sale, and to give notice to the debtor when and where it would take place, so that the latter might know exactly what was being done, and might interfere if necessary. This notice was quite distinct from the notice to pay the debt prior to the exercise of the right of sale. And though the conduct of the sale was left to the creditor, he was bound in all things to consult the interests of the debtor as far as possible. If no suitable purchaser could be found, then the creditor could ask that the thing given as security might be adjudged to belong to himself; but in such a case it could still be redeemed by the debtor

1. The whole doctrine of tacking seems very questionable. There has been an attempt in England to get rid of it, but it has failed. See Coote on Mortgages (ed. 1880), p. 827.

at any time within a year. The only other case in which the creditor could obtain the ownership absolutely for himself was where there had been an express stipulation that, if the debt were not paid, the creditor should become the absolute owner (whilst such an arrangement was allowed(1), or by an agreement to purchase at a fair price.

457. It was the duty of the creditor to get in the money from the purchaser, and after paying himself to hand over the surplus to the debtor. Of course if there was not sufficient to discharge the debt, the balance remained due.

458. A pledge might be created either voluntarily or involuntarily. A voluntary pledge might be created by contract, or by will; an involuntary pledge might be created either by express order of court, or be attributed by the law as an incident of certain transactions.

459. I do not propose to state at length the particular modes in which a security was created by contract, by will, by operation of law, or by the order of Court. I would only note that the Roman law had this great practical convenience, that there were general rules applicable to all kinds of security alike by whatsoever means created. There was no difficulty about this, the general object and character of the transaction being the same throughout; and it conduced greatly to brevity, clearness, and precision of the law that this should be so.

460. A security was not necessarily restricted to a single thing, but there might be a pledge of several things, and even a general pledge of all a man's property. But here an important distinction must be borne in mind. A general pledge of all a man's property is not a pledge of his property viewed as a whole (*universitas*); for then the debts due by him would be included; but it is a pledge of each several thing now belonging or hereafter to belong to the debtor.

461. The following are the principle methods by which a security came to an end: (1) when that pledgee became the owner of the property given in pledge; (2) when it was agreed that the property should be released; (3) when a third person had held the property honestly as his own for twenty years; (4) when the obligation, the performance of which was to be secured, was discharged; (5) when the pledgee exercised his right of sale.

462. No one can have a right of any kind over his own property except the general right of ownership. If, therefore, I am owner of property I cannot hold that property as security. But I may have this right:—that if any one else who has a security over it endeavours to satisfy his claim, he shall have something for me. This is a right which is sometimes called a right of security, and the Roman law gave such a right to the owner in some cases. It gave it, for example, to a

---

(1) See supra, sect. 448, note.

person who having already a first charge bought the property himself. It thus enabled him to protect himself against the claims of subsequent security holders.(1)

463. How to settle the claims of several creditors each holding security upon the same property and each claiming to exercise his rights, has always been a problem of some difficulty. The Roman lawyers acted almost exclusively upon the principle that the creditor earliest in point of time had the prior right, and they justified this by their view of the nature of the right of the pledgee, namely, that it was a right *in rem*, or real right—a right like ownership available against all the world, which no subsequent dealing to which the pledgee was not a party could invalidate or impair. No regard was paid to the mode in which the pledge had been acquired, or did it make any difference that another creditor had obtained possession; as a rule the date alone was looked to.

464. There were, however, exceptions to this rule. Thus when money had been advanced for the express purpose of preserving a thing from destruction, the lender could claim a priority; as, for instance, in the case of a bond for money advanced to equip or repair a ship on a bottomary bond as we should call it(2). The claims of the state for public dues had also a preference over those of private persons.

465. The rights of a subsequent pledgee were the same as those of any other secured creditor, subject only to the rights of the pledgees who preceded him. He could bring the property to sale, and could even compel a prior pledgee to do so. He had also the special right to pay off any prior creditor and take his place; and if the prior creditor refused to take the money, he might deposit it in Court. If the first pledgee sold the property, and the produce was more than sufficient to pay his debt, the next pledgee could claim to be paid out of the surplus.

466. Having thus stated shortly the Roman law of security, I proceed to consider the English law: and, first, as it is administered in the Courts of Common Law.

467. The law is here certainly in a backward condition. These courts can hardly be said to possess any method of giving security over immoveable property,

---

1. It is interesting to compare the English doctrine as to letting in subsequent incumbrances. See Coote on Mortgages, 4th ed., p. 465; also Vangerow, Lehrbuch der Pandekten, sect. 392; Windschied, Lehrbuch d. Pendekten-Rechts, sect. 225, 248, 242.

2. This priority was founded on what was called an *in rem versio*, and was an application of the general principle that one person ought not to be enriched at the expense of another. Windscheid, Lehrbuch des Pandekten-Rechts, sect. 246.

and as to moveable property the law appears to me to be somewhere about in the same state of development as the Roman law at the time of the First Punic War. The common lawyers insist very strongly that possession is necessary to create the security, and upon the difference between pledge and a lien. They consider a lien as a mere personal right of detention which gives the creditor no means of satisfying his debt, but only produces a pressure upon the will of the creditor, arising from the inconvenience of being kept out of his property; whereas (they say) a pledge is something more. The cases are not very explicit as to the distinction, but I gather that a pledge is constituted by adding to a lien the permission to the creditor in case of default to sell and satisfy the debt. It is not however altogether clear when this right of sale exists and when it does not.

468. It is easy to understand that creditors, dissatisfied with a dry right of detention which is very often burdensome, frequently attempt to sell the property pledged; and no subject has vexed English judges more than the question, what remedy a debtor has for a wrongful, a premature, or an unauthorised sale by a creditor of the property which he holds as security. The knot has been partly cut by the Factors' Acts: but it is a question which still frequently arises where these acts do not apply. It is now pretty well settled that the debtor can only recover such actual damage as he may have suffered; and no one can complain of the injustice of the result thus arrived at. But I confess I do not understand a good deal of the reasoning on which this opinion is based, and I think some advantage may be gained by examining it. It is in these cases particularly that so much learning and ingenuity have been expended in establishing that the creditor got not only a lien but a pledge, that is, not a right of detention only of the article pledged, but also a right to sell and apply the proceeds in satisfaction of the debt under the conditions of the contract; *which right*, they say, gives the creditor a 'specific interest or property' in the article, that is to say, a jus in re.(1)

469. Now it is no doubt perfectly true that the pledgee has a 'specific interest or property' in the nature of a jus in re; but what one is at a loss to see is, in what way that depends upon his having also a power of sale. Still less is it easy to perceive how the nature of the creditor's interest can determine the question, to what remedy the debtor is entitled in case of an unauthorised or wrongful sale. This, as the learned judges elsewhere point out in the cases to which I refer, depends upon the contract between the parties, and the effect which is produced by a violation of its terms by one of them.(2).

---

1. Law Reports, Queen's Bench, vol. i. p. 612. Mr. Justice Shee calls it a *jus in re* (p. 595). But he means the same thing; see Austin, Lectures, pp. 990, 922, third ed. I may here observe that what Mr. Justice Shee quotes (at p. 603) as Domat's opinion upon the Roman law is really a statement of the French law, differing in this respect, as Domat points out, from the Roman law.

2. Law Reports, Queen's Bench, vol. i. pp. 600, 615, 619; id. Exchequer, vol. iii. p. 301.

470. I cannot therefore exactly see, why this discussion about the pledgee having a real right is introduced. I am disposed however to think that there has been some misunderstanding as to the true nature of a real right, or jus in re, which the judges are so desirous to attribute to a pledgee.(1) A jus in re is, as we know, a right over a specific thing available generally against all persons, as distinguished from a personal right in respect of the same thing which is available against an individual or individuals only; a *jus in rem*, as distinguished from a *jus in personam*. Ownership, for example, is a real right, and it is in fact the sum of all real rights, as explained above (2) The particular kind of real right which the courts were dealing with in the above cases was not the right of an owner, but the right of one person over a thing owned by another; the right of the creditor in some manner to deal with the debtor's property; a right in kind just like an easement. But whether the pledgee has or has not such a right is wholly unconnected with the right to sell.

471. Possibly what the learned judges were thinking of was, in truth, not a real *right* but a real *security*. What constitutes a real security has already been explained :(3) it is the means of getting satisfaction out of a specific thing independently of the will or ability of the debtor This comprehends a jus in re, or real right, but also a great deal more; and it is perfectly true to say that the essence of a real security is the power of sale. But then it must be borne in mind that the possession by the creditor of a power of sale, and his ability to exercise it, in no way affects or is affected by the nature of his interest in the article pledged. This power of sale when exercised operates, not upon the interest of the creditor, but upon that of the debtor, according to a principle perfectly familiar to any English lawyer.

---

1. I may observe that in the case in the Queen's Bench, Mr. Justice Shee, whilst he agrees with Mr. Justice Blackburn, that the pledgee has a real right, comes to a directly opposite decision upon the case before him.

2 Supra, sect. 339

3. Supra, sect, 447.

APPENDIX I4.

I. I shall determine the province of Jurisprudence.

II. Having determined the province of Jurisprudence, I shall distinguish general jurisprudence, or the philosophy of positive law, from what may be styled particular jurisprudence, or the science of particular law : that is to say, the science of any such system of positive law as now actually obtains, or once actually obtained, in a specifically determined nation, or specifically determined nations.

Note.—Of all the concise expressions which I have turned in my mind, 'the philosophy of positive law' indicates the most significantly the subject and scope of my Course. I have borrowed the expression from a treatise by Hugo, a celebrated professor of Jurisprudence in the University of Göttingen, and the author of an excellent history of the Roman Law. Although the treatise in question is entitled 'the law of nature,' it is not concerned with the law of nature in the usual meaning of the term. In the language of the author, it is concerned with 'the law of nature as a *philosophy of positive law.*' But though this last expression is happily chosen, the subject and scope of the treatise are conceived indistinctly. General jurisprudence, or the philosophy of positive law, is blended and confounded, from the beginning to the end of the book, with the portion of deontology or ethics, which is styled the science of legislation. Now general jurisprudence, or the philosophy of positive law, is not concerned directly with the science of legislation. It is concerned directly with principles and distinctions which are common to various systems of particular and positive law; and which each of those various systems inevitably involves, let it be worthy of praise or blame, or let it accord or not with an assumed measure or test. Or (changing the phrase) general jurisprudence, or the philosophy of positive law, is concerned with law as it necessarily *is*, rather than with law as it *ought* to be : with law as it must be, *be it good or bad*, rather than with law as it must be, *if it be good.*

The subject and scope of general jurisprudence, as contradistinguished to particular jurisprudence, are well expressed by Hobbes in that department of his *Leviathan* which is concerned with civil (or positive) laws. 'By civil law, (says he), I understand the laws that men are therefore bound to observe, because they are members, not of this or that commonwealth in particular, but of a commonwealth. For the knowledge of particular laws belongeth to them that

profess the study of the laws of their several countries: but the knowledge of civil laws in general, to any man. The ancient law of Rome was called their "*civil* law" from the word *civitas*, which signifies a commonwealth: And those countries which, having been under the Roman empire, and governed by that law, still retain such part thereof as they think fit, call that part the "*civil* law," to distinguish it from the rest of their own civil laws. But that is not it I intend to speak of. My design is to show, *not what is law here or there, but what is law:* As Plato, Aristotle, Cicero, and divers others have done, without taking upon them the profession of the study of the law.'

Having distinguished general from particular jurisprudence, I shall show that the study of the former is a necessary or useful preparative to the study of the science of legislation.(5) I shall also endeavour to show, that the study of general jurisprudence might precede or accompany with advantage the study of particular systems of positive law.

Note.—Expounding the principles and distinctions which are the appropriate matter of general jurisprudence, I shall present them abstracted or detached from every particular system. But when such a principle or distinction, as so abstracted or detached, may seem to need examplification, I shall also endeavour to present it with one or both of the forms wherein it respectively appears in the two particular systems which I have studied with some accuracy: namely, the Roman Law and the Law of England.

III. Having determined the province of jurisprudence, and distinguished general from particular jurisprudence, I shall analyse certain notions which meet us at every step, as we travel through the science of law. Of these leading notions, or these leading expressions, the most important and remarkable are the following:—

Person and Thing. Fact or Event, and Incident. Act, Forbearance, and Omission.

Legal Duty, relative or absolute. Legal Right. Legal Rights *in rem*, with their corresponding *Offices*; and Legal Rights *in personam*, with their

---

5. The matter contained in the above section of the Outline does not appear to be further developed in the ensuing lectures. The distinction appears to be assumed, and the author, in the lecture marked XII., immediately proceeds to address himself to the subject of *general* jurisprudence. The subject here referred to will, however, be found more enlarged upon in an essay entitled 'On the Study of Jurisprudence,' printed towards the end of the second volume—R. C.

corresponding *Obligations*. Legal Privilege. Permission (by the Sovereign or State), and Political or Civil Liberty.

Delict or Injury, civil or criminal.

Culpa (in the largest sense of the term), or The Grounds or Causes of *Imputation*: a notion involving the notions of Wish or Desire, of Wish as Motive, and of Wish as Will; of Intention, of Negligence, of Heedlessness, and of Temerity or Rashness. The grounds or causes of *Non-Imputation*: e.g. Infancy, Insanity, *Ignorantia Facti*, *Ignorantia Juris*, *Casus* or Mishap, *Vis* or Compulsion.

Legal Sanction, civil or criminal.

Note.—Though every right implies a corresponding duty, every duty does not imply a corresponding right. I therefore distinguish duties into relative and absolute. A relative duty is implied by a right to which that duty answers. An absolute duty does not answer, or is not implied by, an answering right.

Persons are capable of taking rights, and are also capable of incurring duties. But a person, not unfrequently, is merely the *subject* of a right which resides in *another* person, and avails against *third* persons. And considered as the subject *of* a right, and *of* the corresponding duty, a person is neither invested *with* a right, nor subject *to* a duty. Considered as the subject *of* a right, and *of* the corresponding duty, a person occupies a position analogous to that of a thing. Such, for example, is the position of the servant or apprentice, in respect of the master's right to the servant or apprentice, against third persons or strangers.

Things are *subjects* of rights, and are also *subjects* of the duties to which those rights correspond. But, setting aside a fiction which I shall state and explain in my lectures, things are incapable of taking rights, and are also incapable of incurring duties.

Having determined the province of Jurisprudence, distinguished general from particular Jurisprudence, and analysed certain notions which pervade the science of law, I shall leave that merely prefatory, though necessary or inevitable matter, and shall proceed, in due order, to the various departments and sub-departments under which I arrange or distribute the body or bulk of my subject.

Now the principle of my main division, and the basis of the main departments which result from that main division, may be found in the following considerations.

First: Subject to Slight correctives, the essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be put in the following manner. Every positive law, or every law simply and strictly so called, is set by a sovereign individual or a sovereign body of individuals, to a person or persons in a state of subjection to its author. But some positive laws are set by the sovereign *immediately*: whilst others are set *immediately* by subordinate political superiors, or by private persons in pursuance of legal rights. In consequence of which differences between their *immediate* authors, laws are said to emanate from different *sources* or *fountains*.

Secondly: A law may begin or end in different *modes*, whether it be set immediately by the sovereign one or number, or by a party in a state of subjection to the sovereign.

Thirdly: Independently of the differences between their sources, and between the modes in which they begin and end, laws are calculated or intended to accomplish different *purposes*, and are also conversant about different *subjects*.

Being set or established by different *immediate authors*, beginning and ending in different *modes*, being calculated or intended to accomplish different *purposes*, and being conversant about different *subjects*, law may be viewed from two distinct aspects, and may also be aptly distributed under the two main departments which are sketched or indicated below.

In the first of those main departments, law will be considered with reference to its *sources*, and with reference to the *modes* in which it begins and ends. In the second of those main departments, law will be considered with reference to its *purposes*, and with reference to the *subjects* about which it is conversant.

Austin, vol. I,—pp. 32 to 35.

APPENDIX 14-A.

AN ABSTRACT OF THE FOREGOING OUTLINE.

Preliminay Explanations.

The province of Jurisprudence determined.

General jurisprudence distinguished from particular.

Analyses of certain notions which pervade the science of law.

LAW CONSIDERED WITH REFERENCE TO ITS *SOURCES*, AND WITH REFERENCE TO THE *MODES* IN WHICH IT BEGINS AND ENDS.

Written, or promulged law; and *unwritten*, or unpromulged law.

Law made directly, or in the properly legislative manner; and law made judicially, or in the way of improper legislation——Codification.

Law, the occasions of which, or the motives to the establishment of which, are frequently mistaken or confounded for or with its sources: viz.

Jus moribus constitutum; or law fashioned by judicial decision upon pre-existing custom:

Jus prudentibus compositum; or law fashioned by judicial decision upon opinions and practices of private or unauthorized lawyers:

The *natural law* of modern writers upon jurisprudence, with the equivalent *jus naturale, jus gentium*, or *jus naturale et gentium*, of the classical Roman jurists:

Jus receptum; or law fashioned by judicial decision upon law of a foreign and independent nation:

Law fashioned by judicial decision upon positive international morality.

Distinction of positive law into *law* and *equity*, or *jus civile* and *jus prætorium*.

Modes in which law is abrogated, or in which it otherwise ends.

LAW CONSIDERED WITH REFERENCE TO ITS *PURPOSES*, AND WITH REFERENCE TO THE *SUBJECTS* ABOUT WHICH IT IS CONVERSANT.

Division of Law into Law of Things and Law of Persons.

Principle or basis of that Division, and of the two departments which result from it.

LAW OF THINGS.

Division of rights, and of duties (relative and absolute), into primary and sanctioning.

Principle or basis of that division, and of the two departments which result from it.

Principle or basis of many of the sub-departments into which those two departments immediately sever: namely, The distinction of rights and of relative duties, into rights *in rem* with their answering *offices*, and rights *in personam* with their answering *obligations*.

Method or order wherein the matter of the Law of Things will be treated in the intended lectures.

Preliminary remarks on things and persons, as subjects of rights and duties: on acts and forbearances, as objects of rights and duties: and on facts or events, as causes of rights and duties, or as extinguishing rights and duties.

Primary Rights, with primary relative Duties.

Rights *in rem* as existing *per se*, or as not combined with rights *in personam*.

Rights *in personam* as existing *per se*, or as not combined with rights *in rem*.

Such of the *combinations* of rights *in rem* and rights *in personam* as are particular and comparatively simple.

Such *universities* of rights and duties (or such complex aggregates of rights and duties) as arise by universal succession.

Sanctioning Rights, with sanctioning Duties (relative and absolute).

Delicts distinguished into civil injuries and crimes: or rights and duties which are effects of civil delicts, distinguished from duties, and other consequences, which are effects of criminal.

Rights and duties arising from civil injuries.

Duties, and other consequences, arising from crimes.

[*Interpolated description of primary absolute duties.*]

LAW OF PERSONS.

Distribution of *status* or conditions under certain principal and subordinate classes.

Division of law into *public* and *private*.

Review of private conditions.

Review of political conditions.

The *status* or condition (improperly so called) of the monarch or sovereign number.

Division of the law which regards political conditions, into *constitutional* and *administrative*.

Boundary which severs political from private conditions.

Review of anomalous or miscellaneous conditions.

The respective arrangements of those sets of rights and duties which respectively compose or constitute the several status or conditions.

Austin, vol. I.—pp. 76 to 78.

APPENDIX 14-A-2.

(1) "It is much to be wished that the difference between them could be ascertained. For of all the perplexing questions which the science of jurisprudence presents, the notion of status or condition is incomparably the most difficult."—Sec. XII, p. 362.

(2) "As every imaginable right belongs to one of these classes, (*i.e.*, *jus in rem* or *jus in personam*) or else is compounded of rights belonging to each of these classes, it is manifest that a full exposition of this all-pervading distinction were merely equivalent to a full exposition of the entire science of law."—Sec, XIV, p. 382.

APPENDIX 14-B.

The matter of the following Essay is chiefly taken from the Opening Lectures of the two several Courses delivered by Mr. Austin at the London University and at the Inner Temple. The first ten lectures of the former and longer Course were published (greatly altered and expanded) by the Author, in a volume bearing the title of 'The Province of Jurisprudence Determined;' which has been republished since his death. The form and character which he gave to that work rendered an Introductory Lecture superfluous and inappropriate. It was consequently omitted; nor was there any use or place assigned to it.

It is evident that a discourse of the kind could not, with any fitness, be prefixed to the subsequent Lectures of that Course, as now published.

The Second Opening Lecture was likewise necessarily excluded by the Author's arrangement; according to which the lectures delivered at the Inner Temple were (as I have said elsewhere) incorporated with the previous and longer Course. Like the former, this therefore remained without any designated place.

Such however, I knew, was Mr. Austin's sense of the importance of the study of Jurisprudence, that if he had completed any work containing the full expression of his opinions, all that is here gathered together (and probably much more) would doubtless have been urged in favour of its cultivation. I have therefore thought it right to preserve and to consolidate whatever was of permanent value in these two Introductory Lectures, and have incorporated with them some fragments on the subject of which they treat. In this instance, and in this alone, I have presumed to make some slight changes in the form of what he wrote; I have united the two discourses, the subject and purport of which is the same, into one continuous Essay; omitting inevitable repetitions and supplying a few links from other sources.

The table at the end does not belong to either Lecture, nor to any part of the matter above described. I found it among loose scraps, with no mark or reference as to its destination. Perhaps it belonged to a few notes relating to the work 'On the principles and Relations of Jurisprudence and Ethics,' which he meditated.(53) As it gives a brief but comprehensive view of his Idea of the course of study necessary to the forming of an accomplished Lawyer or Statesman, it seemed to find its place with this Essay.—S. A.

---

53. See Vol. I. preface, p. 17, *ante*.

The appropriate subject of Jurisprudence, in any of its different departments, is positive law: Meaning by positive law (or law emphatically so called), law established or 'positum,' in an independent political community, by the express or tacit authority of its Sovereign or supreme government.

Considered as a whole, and as implicated or connected with one another, the positive laws and rules of a particular or specified community, are a system or body of law. And as limited to any one of such systems, or to any of its component parts, jurisprudence is particular or national.

Though every system of law has its specific and characteristic differences, there are principles, notions, and distinctions common to various systems, and forming analogies or likenesses by which such systems are allied.

Many of these common principles are common to all systems;—to the scanty and crude systems of rude societies, and the ampler and maturer systems of refined communities. But the ampler and maturer systems of refined communities are allied by the numerous analogies which obtain between all systems, and also by numerous analogies which obtain exclusively between themselves. Accordingly, the various principles common to maturer systems (or the various analogies obtaining between them), are the subject of an extensive science: which science (as contradistinguished to national or particular jurisprudence on one side, and, on another, to the science of legislation) has been named General (or comparative) Jurisprudence, or the philosophy (or general principles) of positive law.

As principles abstracted from positive systems are the subject of general jurisprudence, so is the exposition of such principles its exclusive or appropriate object. With the goodness or badness of laws, as tried by the test of utility (or by any of the various tests which, divide the opinions of mankind), it has no immediate concern. If, in regard to some of the principles which form its appropriate subject, it adverts to considerations of utility, it adverts to such considerations for the purpose of explaining such principles, and not for the purpose of determining their worth. And this distinguishes the science in question from the science of legislation: which affects to determine the test or standard (together with the principles subordinate or consonant to such test) by which positive law ought to be made, or to which positive law ought to be adjusted.

If the possibility of such a science appear doubtful, it arises from this; that in each particular system, the principles and distinctions which it has in common with others, are complicated with its individual peculiarities, and are expressed in a technical language peculiar to itself.

It is not meant to be affirmed that these principles and distinctions are conceived with equal exactness and adequacy in every particular system. In this

respect different systems differ. But, in all, they are to be found more or less nearly conceived; from the rude conceptions of barbarians, to the exact conceptions of the Roman lawyers or of enlightened modern jurists.(54)

I mean, then, by General Jurisprudence, the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law: understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction.

Of the principles, notions, and distinctions which are the subjects of general jurisprudence, some may be esteemed necessary. For we cannot imagine coherently a system of law (or a system of law as evolved in a refined community), without conceiving them as constituent parts of it.

Of these necessary principles, notions, and distinctions, I will suggest briefly a few examples.

1°. The notions of Duty, Right, Liberty, Injury, Punishment, Redress; with their various relations to one another, and to Law, Sovereignty and Independent Political Society:

2°. The distinction between written or promulged, and unwritten or unpromulged law, in the juridical or improper senses attributed to the opposed

---

54. Universal Jurisprudence is the science of the *Jus Gentium* of the Roman Lawyers, as expounded by Gaius.

Mr. Bentham is of opinion that it must be confined within very narrow bounds. This is true, if by expository Universal Jurisprudence he intended, Jurisprudence expository of that which *obtains* universally as Law.

For (1°) Assuming that the systems of all nations, wholly or in part, exactly resembled each other (i.e. that all or many of the provisions to be found in those several systems were exactly alike), still we could not speak of them with propriety as forming a Universal Law; the sanction being applied *by the Government of each community*, and not by a superior common to all mankind. And this (as we shall see hereafter) ranks international law with morals rather than with law.

(2°) As is observed by Mr. Bentham, the provisions of different systems are never precisely alike; the only parts in which they agree exactly, being those leading expressions which denote the necessary parts of every system of law. E. g. The Rights of husbands, wives, etc.; the law relating to easements here and *servitudes* in France resemble or are analogous; but are still not precisely alike either in matter or form, and therefore cannot be described by the same form of words.

expressions; in other words, between law proceeding immediately from a sovereign or supreme maker, and law proceeding immediately from a subject or subordinate maker (with the authority of a sovereign or supreme):

3°. The distinction of Rights, into rights availing against the world at large (as, for example, property or dominion), and rights availing exclusively against persons specifically determined (as, for example, rights from contracts).

4°. The distinction of rights availing against the world at large, into property or dominion, and the variously restricted rights which are carved out of property or dominion:

5°. The distinction of Obligations (or of duties corresponding to rights against persons specifically determined) into obligations which arise from contracts, obligations which arise from injuries, and obligations which arise from incidents that are neither contracts nor injuries, but which are styled analogically obligations 'quasi ex contractu:'

6°. The distinction of Injuries or Delicts, into civil injuries (or private delicts) and crimes (or public delicts); with the distinction of civil injuries (or private delicts) into torts, or delicts (in the strict acceptation of the term), and breaches of obligations from contracts, or of obligations 'quasi ex contractu.'

It will, I believe, be found, on a little examination and reflection, that every system of law (or every system of law evolved in a refined community), implies the notions and distinctions which I now have cited as examples; together with a multitude of conclusions imported by those notions and distinctions, and drawn from them, by the builders of the system, through inferences nearly inevitable.

Of the principles, notions, and distinctions which are the subjects of General Jurisprudence, others are not necessary (in the sense which I have given to the expression). We may imagine coherently an expanded system of law, without conceiving them as constituent parts of it. But as they rest upon grounds of utility which extend through all communities, and which are palpable or obvious in all refined communities, they in fact occur very generally in matured systems of law; and therefore may be ranked properly with the general principles which are the subjects of general jurisprudence.

Such, for example, is the distinction of law into 'jus personarum' and 'jus rerum': the principle of the scientific arrangement given to the Roman Law by the authors of the elementary or institutional treatises from which Justinian's Institutes were copied and compiled. The distinction, I believe, is an arbitrarily assumed basis for a scientific arrangement of a body of law. But being a commodious basis for an arrangement of a body of law, it has been very generally adopted by those who have attempted such arrangements in the modern European nations. It has been very generally adopted by the compilers of the authoritative

Codes which obtain in some of those nations, and by private authors of expository treatises on entire bodies of law. Nay, some who have mistaken the import of it, and who have contemptuously rejected it, as denoted by the obscure antithesis of 'jus personarum et rerum,' have yet assumed it under other (and certainly more appropriate) names, as the basis of a natural arrangement. Meaning, I presume, by a natural arrangement, an arrangement so commodious, and so highly and obviously commodious, that any judicious methodiser of a body of law would naturally (or of course) adopt it.

But it will be impossible, or useless, to attempt an exposition of these principles notions and distinctions, until by careful analysis, we have accurately determined the meaning of certain leading terms which we must necessarily employ; terms which recur incessantly in every department of the science: which, whithersoever we turn ourselves, we are sure to encounter. Such, for instance, are the following: Law, Right, Obligation, Injury, Sanction: Person, Thing, Act, Forbearance. Unless the import of these are determined at the outset, the subsequent speculations will be a tissue of uncertain talk.

Austin, vol. II.—pp. 1106 to 1110.

APPENDIX 14-C.

It is not unusual with writers who call and think themselves '*institutional*,' to take for granted, that they know the meaning of these terms, and that the meaning must be known by those to whom they address themselves. Misled by a fallacious test, they fancy that the meaning is simple and certain, because the expressions are familiar. Not pausing to ask their import, not suspecting that their import can need inquiry, they cast them before the reader without an attempt at explanation, and then proceed (without ceremony) to talk about them.

These terms, nevertheless, are be set with numerous ambiguities: their meaning, instead of being simple, is extremely complex: and every discourse which embraces Law as a whole, should point distinctly at those ambiguities, and should sever that complex meaning into the simpler notions which compose it.

Many of those who have written upon Law, have defined these expressions. But most of their definitions are so constructed that, instead of shedding light upon the thing defined, they involve it in thicker obscurity. In most attempts to define the terms in question, there is all the pedantry without the reality of logic: the form and husk, without the substance. The pretended definitions are purely circular: turning upon the very expressions which they affect to elucidate, or upon expressions which are exactly equivalent.

In truth, some of these terms will not admit of definition in the formal or regular manner. And as to the rest, to define them in that manner is utterly useless. For the terms which enter into the abridged and concise definition, need as much elucidation as the very expression which is defined.

The import of the terms in question is extremely complex. They are short marks for long series of propositions. And, what aggravates the difficulty of explaining their meaning clearly, is the intimate and indissoluble connection which subsists between them. To state the signification of each, and to shew the relation in which it stands to the others, is not a thing to be accomplished by short and disjointed definitions, but demands a dissertation, long, intricate and coherent.

For example: Of Laws or Rules there are various classes. Now these classes ought to be carefully distinguished. For the confusion of them under a common name, and the consequent tendency to confound Law and Morals, is one most prolific source of jargon darkness and perplexity. By a careful analysis of leading

terms, law is detached from morals, and the attention of the student of jurisprudence is confined to the distinctions and divisions which relate to law exclusively.

But in order to distinguish the various classes of laws, it is necessary to proceed thus:—To exhibit, first, the resemblance between them, and, then, their specific differences: to state *why* they are ranked under a common expression, and then to explain the marks *by which* they are distinguished. Till this is accomplished, the appropriate subject of Jurisprudence is not discernible precisely. It does not stand out It is not sufficiently detached from the resembling or analogous objects with which it is liable to be confounded.

Thus, for example, in order to establish the distinction between Written and Unwritten Law, we must scrutinise the nature of the latter: a question which is full of difficulty; and which has hardly been examined with the requisite exactness by most of the writers who have turned their attention to the subject. I find it much vituperated, and I find it as much extolled; but I scarcely find an endeavour to determine *what it is*. But if this humbler object were well investigated, most of the controversy about its merits would probably subside.

To compare generally, or in the abstract, the merits of the two species, would be found useless: and the expediency of the process which has been styled Codification, would resolve itself into a question of time, place, and circumstance.

The word Jurisprudence itself is not free from ambiguity; it has been used to denote—

The knowledge of Law as a science, combined with the art or practical habit or skill of applying it; or, secondly,

Legislation;—the science of what *ought to be done* towards making good laws, combined with the art of doing it.

Inasmuch as the knowledge of what ought to be, supposes a knowledge of what is, legislation supposes jurisprudence, but jurisprudence does not suppose legislation. What laws have been and are, may be known without a knowledge of what they ought to be. Inasmuch as a knowledge of what ought to be, is bottomed on a knowledge of antecedents *cognato genere*, legislation supposes jurisprudence.

With us, Jurisprudence is the science of what is essential to law, combined with the science of what it ought to be.(55) It is particular or universal. Particular Jurisprudence is the science of any actual system of law, or of any portion of it. The only practical jurisprudence is particular.

---

55. For its meaning in the sense of the French, see Blondeau, Dupin, and others.

The proper subject of General or Universal Jurisprudence (as distinguished from Universal Legislation) is a description of such subjects and ends of Law as are common to all system ; and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in their several positions.

And these resemblances will be found to be very close, and to cover a large part of the field. They are necessarily confined to the resemblances between the systems of a few nations ; since it is only a few systems with which it is possible to become acquainted, even imperfectly. From these, however, the rest may be presumed. And it is only the systems of two or three nations which deserve attention ;—the writings of the Roman Jurists ; the decisions of English Judges in modern times ; the provisions of French and Prussian Codes as to arrangement. Though the points are also few in which the laws of nations ought to be the same (i.e. precisely alike), yet there is much room for universal legislation : i.e. the circumstances not precisely alike may be treated of together, in respect of what they have in common ; with remarks directed to their differences. Whether the principles unfolded deserve the name of Universal or not, is of no importance. Jurisprudence may be universal with respect to its subjects : Not less so than legislation.

It is impossible to consider Jurisprudence quite apart from Legislation ; since the inducements or considerations of expediency which lead to the establishment of laws, must be adverted to in explaining their origin and mechanism. If the causes of laws and of the rights and obligations which they create be not assigned, the laws themselves are unintelligible.

Where the subject is the same, but the provisions of different systems with respect to that subject are different, it is necessary to assign the causes of the differences ; whether they consist in a necessary diversity of circumstances, or in a diversity of views on the part of their respective authors with reference to the *ends* of Law. Thus, the rejection or limited reception of entails in one system, and their extensive reception in another, are partly owing to the different circumstances in which the communities are placed ;—partly to the different views of the aristocratic and democratic legislators by whom these provisions have been severally made.

So far as these differences are inevitable—are imposed upon different countries—there can be no room for praise or blame. Where they are the effect of choice, there is room for praise or blame ; but I shall treat them not as subjects of either, but as *causes* explaining the existence of the differences. So of the admission or prohibition of divorce—Marriages within certain degrees, etc.

Wherever an opinion is pronounced upon the merits and demerits of Law, an impartial statement of the conflicting opinions should be given. The teacher of

Jurisprudence may have, and probably has, decided opinions of his own ; but it may be questioned whether earnestness be less favourable to impartiality than indifference ; and he ought not to attempt to insinuate his opinion of merit and demerit under pretence of assigning causes. In certain cases which do not try the passions (as rescission of contract for inadequacy of consideration) he may, with advantage, offer opinions upon merits and demerits. These occasional excursions into the territory of Legislation, may serve to give a specimen of the manner in which such questions should be treated. This particularly applies to Codification : a question which may be agitated with safety, because everybody must admit that Law ought to be known, whatever he may think of the provisions of which it ought to consist.

Attempting to expound the principles which are the subject of the science of Jurisprudence (or rather to expound as many of them as a limited Course of Lectures will embrace), he must not only try to state them in general or abstract expressions, but must also endeavour to illustrate them by examples from particular systems : especially by examples from the Law of England, and from the Roman or Civil Law.

Austin, vol. II.—pp. 1110 to 1114.

APPENDIX 15.

1.—"The present treatise is an attempt to set forth and explain those comparatively few and simple ideas which underline the infinite variety of legal rules"—p. 1.

2.—"In this, as in other departments of knowledge, the difficulty of the subject is due less to the multiplicity of its details than to the absence of general principles under which those details may be grouped. In other words, while legal science is capable of being intelligently learnt, isolated legal facts are capable only of being committed to memory"—pp. 1-2.

3.—"For the beginnings of the science which reduces legal phenomena to order and coherence the world is indebted to Roman"—p. 2.

4.—"The Romans had, in fact attained by this time to the idea of a science of those legal principles which exist independently of the institutions of any particular country."—p. 3.

5.—"It is therefore natural and convenient that most of the European nations should express the idea of a science of law by a word which they have borrowed from the language of those by whom the idea was first conceived."—pp. 3-4.

6.—"Now an exposition of existing law is obviously quite another thing from a science of law, and criticisms upon the law with a view to its amendment are the subjects not of jurisprudence, but, as Bentham himself states in the next paragraph, of the art of Legislation."—pp. 4-5.

7.—"'Jurisprudence' ought therefore to be used, and used without any qualifying epithet, as the name of a science."—p. 5.

8.—"We have next to inquire what kind of a science it is; and we shall find that it is a formal, or analytical, as opposed to a natural one; that is to say, that it deals rather with the various relations which are regulated by legal rules than with the rules themselves which regulate those relations. This was not indeed the whole scope of the science as conceived by its founders. There floated also always before the eyes of the later Roman jurists a vision of a "*jus naturale*;" a universal code, from which all particular systems are derived, or to which they all tend, at least, to approximate: a set of rules, the matter, or contents of which is of universal application. But in point of fact, and in the very pursuit of this material unity, they were led to elaborate a system of formal unity; to catalogue the topics with which every system of law has to deal, however each may differ from the rest in its mode of dealing with them. They performed for Law a service similar to that which was rendered to Language by the Greeks

of Alexandria, when by observing and tabulating the parts of speech the inflections, moods and syntax, they invented a grammar, under the formulae of which all the phenomena of any language find appropriate places. Whether the possessive case of a noun substantive is expressed by a specific modification of its termination, or by prefixing to it a specific preposition, is a question of the matter of language; but that the possessive idea, however variously expressed, yet finds some expression or other in every family of human speech, is a proposition which relates to linguistic form."—pp. 5-6.*

9.—"The assertion that Jurisprudence is a formal science may perhaps be made clear by an example. If any individual should accumulate a knowledge of every European system of law, holding each apart from the rest in the chambers of his mind, his achievement would be best described as an accurate acquaintance with the legal systems of Europe. If each of these systems were entirely unlike the rest, except when laws had been transferred in the course of history from one to the other, such a distinguished jurist could do no more than endeavour to hold fast, and to avoid confusing, the heterogeneous information of which he had become possessed. Suppose however, as is the case, that the laws of every country contain a common element; that they have been constructed in order to effect similar objects and involve the assumption of similar moral phenomena as everywhere existing; then such a person might proceed to frame out of his accumulated mate-

---

* It is difficult to understand in what specific manner does Jurisprudence as conceived by Dr. Holland deal "with the various relations which are regulated by legal rules." The relations regulated by legal rules are for example—marriage, guardianship, trust, ownership, possession, the relations between landlord and tenant, vendor and purchaser, debtor and creditor, and so on, and we fail to see what kind of dealing with such relations makes up the science of Jurisprudences.

Again the analogy between Jurisprudence and Grammar does not seem to hold good. The typical proposition of the so called science of Grammar—the possessive idea finds some expression in every family of human speech - if analogous at all would be analogous to the typical proposition of comparative law—the relation of marriage is regulated by every system of positive law. There can however be no analogy between any proposition of Grammar similar to the one mentioned by Dr. Holland, and any of the following propositions which find a place in the Elements of Jurisprudence:—

1. The expression 'source of law' is used in three different senses.

2. Custom is the oldest form of law making.

3. Legislation tends with advancing civilisation to become the nearly exclusive source of new law.

In fact it would be difficult to find any proposition like the one of Grammar in the whole Elements of Jurisprudence.—S. K. H.

rials a scheme of the purposes, methods and ideas common to every system of law. Such a scheme would be a formal science of law; presenting many analogies to Grammar, the science of those ideas of relations which, in greater or less perfection, and often in the most dissimilar ways, are expressed in all the languages of mankind."—pp. 6-7.

10.—"So comparative law collects and tabulates the legal institutions of various countries, and from the results thus prepared, the abstract science of jurisprudence is enabled to setforth an orderly view of the ideas and methods which have been variously realised in actual systems. It is, for instance, the office of Comparative Law to ascertain what have been at different times and places the periods of prescription, or the requisites of a good marriage. It is for jurisprudence to elucidate the meaning of prescription, in its relation to ownership and to actions, or to explain the legal aspect of marriage, and its connection with property and the family."—pp. 7-8.

11.—"We are not indeed to suppose that Jurisprudence is impossible unless it is preceded by Comparative Law. A system of Jurisprudence might conceivably be constructed from the observation of one system of law only, at one epoch of its growth."—p. 8.

12.—"Jurisprudence is therefore not the material science of those portions of the law which various nations have in common, but the formal science of those* relations of mankind which are generally recognised as having legal consequences."—p. 8.

13.—"Jurisprudence is not a science of legal relations *a priori* as they might have been, or should have been, but is abstracted *a posteriori* from such relations as have been clothed with a legal character in actual systems, that is to say from law which has actually been imposed, or positive law. It follows that Jurisprudence is a progressive science. Its generalisations must keep pace with the movement of systems of actual law Its broader distinctions, corresponding to deep-seated human characteristics, will no doubt be permanent, but, as time goes on, new distinctions must be constantly developed, with a view to the co-ordination of the ever-increasing variety of legal phenomena."†—p 8.

---

*It is impossible to realise the contents of the science of those relations of mankind which are generally recognised as having legal consequence. Granting that such a science is possible, there is little doubt that the science of those relations can not be the same as the science of positive law.—S. K. H.

†We fail to see how a science in order to be the formal science of positive law can be abstracted from the relations which exist between husband and wife, guardian and ward, trustee and beneficiaries, owner and his property, vendor and purchaser, mortgagor and mortgagee, and the like. And as these relations are distinct from the rules of positive law any science abstracted from them can not possibly be the formal science of positive law.—S. K. H.

14.—"So Lord Hale: 'It can not be supposed that humane laws can be wholly exempt from the common fate of humane things. Parliaments have taken off and abridged many of the titles about which the law was concerned: usage and disusage hath antiquated others... and it shall not be altogether impertinent to give some instances herein of several great titles in the Law, which upon those occasions are at this day in a great measure antiquated, and some that are much abridged and reduced into a very narrow compass and use' (he mentions inter alia, tenures by knight-service, descents to take away entry, atturnment), 'and as time and experience and use, and some acts of Parliament, have abridged some and antiquated other titles, so they have substituted or enlarged other titles: as for instance, action upon the case, devises, ejectione firmæ, election, and divers others.' Preface to Rolle's Abridgment, 1668. Cf. the interesting remarks of Sir Henry Maine on the probability that a general adoption of a system of Registration of title would render comparatively unimportant such tonics as Possession, Bonitarian, Ownership, and Usucapio; 'although these have always been recognised as belonging to what may be called the osseous structure of Jurisprudence.' Early Law and Custom."—Note No 3, pp. 8 9.

15.—"A science of Law might undoubtedly, be constructed from a knowledge of the law of England alone, as a science of Geology might be, and in great part was, constructed from an observation of the strata in England only."—pp. 9-10.

16.—"A distinction may also be suggested between 'historical' and 'philosophical' Jurisprudence. It may be said that the unity which makes Jurisprudence a science exists only in idea; that while it has a side upon which it is closely allied to Ethics and to Metaphysics, it is on the other hand, no less intimately connected with Archaeology and History; that its phenomena grow from many independent rootes, and are formed and coloured according to the character of the various soils from which they have sprung. But to say this is only to say that the facts from which Jurisprudence generalises are furnished by History, the record of human actions. Identical human needs have been satisfied by various means, and all the means of satisfying each of these needs have not been in simultaneous use in every part of the world and in every age. In the satisfaction of their needs mankind have seldom seen clearly the ends at which they were aiming, and have therefore in reaching after those ends invented a vast variety of perverse complications. The unity, in short, which it is the business of Jurisprudence to exhibit as underlying all the phenomena which it investigates, is the late discovery of an advanced civilisation, and was unperceived during much of the time during which those phenomena were accumulating. The facts can only be presented by History, and History may be studied with the sole view of discovering this class of facts. But this is not the task of Jurisprudence which only begins when these facts begin to fall into an order other than the historical, and arrange themselves in groups which have no relation to the varieties of the human race. The province of Jurisprudence is to observe the wants for the supply

of which laws have been invented, and the manner in which those wants have been satisfied. It then digests those actuals wants, and the modes in which they have actually been satisfied, irrespectively of their historical or geographical distribution, according to a logical method One work on Jurisprudence may contain more of historical disquisition, while in another philosophical argument may predominate ; but such differences are incidental to the mode of treatment, and afford no ground for a division of the science itself."*—pp. 10-11.

17.—"It would therefore be unobjectionable to talk of 'criminal' and 'civil,' 'public' and 'private' Jurisprudence."—p. 11.

18.—"To sum up.—The term Jurisprudence is wrongly applied to actual systems of law, or to current views of law, or to suggestions for its amendment, but is the name of a science. This science is a formal, or analytical, rather than a material one. It is the science of actual, or positive, law. It is wrongly divided into 'general' and 'particular' or into 'philosphical' and 'historical.' It may therefore be defined provisionally as 'the formal science of positive law' The full import of this definition will not be apparent till the completion of an analysis of the all important term 'Law.'"—p. 12.

19.—"Jurisprudence is concerned not so much with the purposes which Law subserves, as with the means by which it subservest hem. The purposes of Law are its remote objects. The means by which it effects those purposes are its immediate objects. The immediate objects of Law are the creation and protection of legal rights."—p. 67.

20.—"The creation and enforcement of legal duties is of course the same thing from another point of view ; and a point of view from which some writers prefer to regard the operation of Law." Cf. infra—p. 73, Note (4) on p. 67.

21.—"Acts are divided by Jurisprudence into those which are 'lawful' and those which are 'unlawful.'"—p. 96.

---

*According to this passage the province of Jurisprudence is :—

1.—To observe the wants for the supply of which laws have been invented,

2.—To digest those actual wants and the modes in which they have actually been satisfied.

One finds himself in the dark regarding the meaning to be assigned to the wants for the supply of which laws have been invented, Let us assume that those wants mean : want of a line of action for husband, for wife, for vendor, for purchaser, for trustee, for ruler, for subject, and the like. Granting the above assumption it is difficult to understand in what way does Jurisprudence observe them, and in what way does it digest them.—S. K. H.

APPENDIX 15-A.

Adjective law, though it concerns primarily the rights and acts of private litigants, touches closely on topics, such as the organisation of Courts and the duties of judges and sheriffs, which belong to public law. It comprises the rules for (i) selecting the jurisdiction which has cognisance of the matter in question ; (ii) ascertaining the Court which is appropriate for the decision of the matter ; (iii) setting in motion the machinery of the Court so as to procure its decision ; and (iv) setting in motion the physical force by which the judgment of the Court is, in the last resort, to be rendered effectual. These rules, like those of substantive law, are primarily applicable to persons of the normal type, and only with certain modifications to abnormal persons.

i. It is by no means the case that a remedial right is capable of being enforced everywhere. An English Court will for instance entertain an action for breach of contract quite irrespectively of the place where it was made, or broken, or in which the parties reside, but will hardly hear an application for a divorce unless the parties are domiciled in the country, nor would till recently try an action for trespass to land unless the land were within the realm.

ii. It is also necessary that proceedings be taken in the appropriate Court. Thus in England, even after the changes introduced by the Judicature Acts, it will usually be advisable that an administration suit should be commenced in the Chancery division and a salvage suit in the Admiralty division of the High Court of Justice. There are also matters which can only be tried in one or other of the divisions of that Court, and not in any inferior tribunal.

iii. The choice of the appropriate Court is a simple matter compared with rightly setting its machinery in motion. In this operation, which has been described by such phrases as 'legis actio,' 'l'instance,' 'la demande judiciaire,' 'action,' 'suit' 'Verfahren' the following stages are usually distinguishable.

1. The summons, or citation, by which the plaintiff brings the defendant into Court.

2. The pleadings, 'l'instruction de la cause,' by which the plaintiff informs the Court and the defendant of the nature of his claim, and the defendant states the nature of his defence. The defence may be to the effect that, even granting the truth of the plaintiff's allegations of fact, they are in law no

ground for his claim against the defendant, or it may consist in denying altogether the facts alleged by the plaintiff, or in admitting them, but alleging other facts, such as a release or the Statutes of Limitation, which neutralise the effect which they would otherwise have had. A defence of the last-mentioned kind was called in Roman law an 'exceptio,' and in England a plea in 'confession and avoidance(1).' A plea may be either 'dilatory,' showing that the right of action is not yet available, or peremptory, showing that it is non-existent. The exchange of pleadings continues till it is clear how much is admitted and how much is denied on either side, and therefore what is precisely the dispute between the parties. This process may be carried on orally in the presence of the Court, as under the new code of Civil Procedure for the German Empire(2), or in writing or print, as in England. When well managed it gives much scope for dexterous intellectual fencing, but its tendency to over-subtlety has been a fertile theme for legal critics from the time of Gaius to that of Bentham.(3)

The trial, hearing, or 'audience,' at which each of the parties endeavours to establish to the satisfaction of the Court the truth of the view maintained by him of the question at issue, whether it be one of law or one of fact; if of law, by citing authorities, if of fact, by adducing proofs. Proofs may be either documentary or oral, and certain rules exist in most systems with reference to their admissibility, amounting in some systems to a body of law of no little complexity. Such a 'law of evidence' is more necessary when

---

1. 'Comparatae sunt autem exceptiones defendendorum eorum gratia cum quibus agitur: saepe enim accidit ut, licet ipsa actio qua actor experitur iusta sit, tamen iniqua sit adversus eum cum quo agitur.' Inst. iv. 13.

2. Civilprozessordnung für das Deutsche Reich, § 119. But in 'Anwaltsprozesse,' i. e. when professional representatives must be employed, disadvantages as to costs, and otherwise, follow, unless 'die mündliche Verhandlung' is 'durch Schriftsatze verbereited,' § 120: and copies of these writings are to be filed in Court, § 124. Cf. the recommendations of the Lord Chancellor's Committee on Procedure, 1881.

3. The 'legis actiones,' says Gaius, gradually fell into disrepute, 'namque ex nimia subtilitate veterum, qui tunc iura condiderunt, eo res perducta est, ut vel qui minimum erraset litem perderet; iv. 30: and he gives the following instance, 'cum qui de vitibus succisis ita egisset ut in actione vites nominaret responsum est eum rem perdidisse, quia debuisset arbores nominare, eo quod lex xii tabularum, ex qua de vitibus succisis actio competeret, generaliter de arboribus succisis loqueretur; ib. 11. Cf. Bentham, Works, ii, p. 14.

question are tried by a jury than when they are decided by a professionally trained judge. Its objects are, on the one hand, to limit the field of enquiry, by the doctrine that certain classes of facts are already within the 'judicial notice' of the Courts, and by 'presumptions' by which certain propositions are to be assumed to be sufficiently proved when certain other propositions have been established; and on the other hand, to exclude certain kinds of evidence as having too remote a bearing on the issue, or as incapable of being satisfactorily tested, or as coming from a suspicious quarter (1) For the last-mentioned reason certain classes of persons, or persons occupying certain relative positions are rendered incapable of being witnesses. There are also rules regulating the right of the parties to appear in person, or to be represented by advocates and the order in which the parties or their advocates may tender their evidence and address the Court.

4. The judgment, by which the Court decides the question in litigation. It may relate to a right to property, or an ascertainment(2) or a dissolution(3) of status, or an affirmation of the due execution of a legal act, or an award of damages for a wrong, or an order for the specific performance or non-performance of a certain act.

The judgment usually charges upon the losing side the 'costs' to which the other party has been put in consequence of the suit.(4)

5. The procedure on Appeal, when an Appeal is possible and is resorted to by either party.(5)

iv. Execution, whereby a successful party calls upon the officers of the Court, or other appropriate State functionaries, to use such force as may be

---

1. The German Civilprozessordnung is opposed to Presumptions and other so-called 'artificial' proofs; cf. § 259. The Einführungsgesetz, § 14, repeals laws restricting modes of proof. The theory of legal proof is no doubt largely due to the canonists, but it can hardly be said to have been wholly unknown to Roman law. See the opinion of Favorinus, apud Gell. Notes A. xiv. 2.

2. E. g. on a declaration of nullity, or under the Legitimacy Declaration Act, 21 and 22 Vict. c. 93.

3. On a decree of divorce.

4. Cf. supra, p. 155.

5. The Sachsenspiegel gave a right of appeal to a dissentient member of the Court, as having an interest on public grounds that the law should be correctly stated.

necessary in order to carry the judgment into effect. It may be remarked that a successful defendant, except for the recovery of his costs, has obviously no need of execution, and that execution of a judgment in a civil cause is not *ex officio*, i. e. does not take place except on the demand of a litigant party.

Besides the original parties to an action, whose interests are directly involved in it, other persons may be brought into it by the authority of the Court. In some actions, which involve wider interests than those of the parties, notice must be given to a State functionary, who may then intervene in the proceedings on public grounds.(2).

A maximum interval may be fixed between each step in an action, on pain of a decision being given 'in default' against the party who neglects to proceed in due course.

---

2. See Code de Procedure Civile, P. I. liv. ii. tit. 4, De la Communication au Ministére Public ; Gerichtsverfassungsgesetz für das Deutsche Reich, § 152 ; Civilprozessordnung, § 568 ; and, as to the Queen's Proctor, 23 and 24 Vict. c. 144. s. 5.

Jurisprudence Holland—pp. 291 to 295.

APPENDIX 16.

Jurisprudence.—Jurisprudence is a term of much latitude, but when used strictly must be taken to mean the Science of Law. The Science of Law is complete only when it has laid bare both the nature and the genesis of law: the nature of law must be obscure until its genesis and the genesis of the conceptions upon which it is based have been explored; and that genesis is a matter, not of logical analysis, but of history. Many writers upon Jurisprudence, therefore have insisted upon the historical method of study as the only proper method. They have sought in the history of society and of institutions to discover the birth and trace the development of Jural conceptions, the growths of practice which have expended into the law *of* property or of torts, the influences which have contributed to the orderly *regulation* of man's conduct in society.

In the hands of another school of writers, however, Jurisprudence has been narrowed to the dimensions of a science of law in its modern aspects only. They seek to discover, by an analysis of law in its present full development, the rights which habitually receive legal recognition and the methods by which states secure to their citizens their rights, and enforce upon them their duties, by positive rules backed by the abundant sanction of the public power. In their view, not only is the history of law not Jurisprudence, but, except to a very limited extent, it is not even the material of Jurisprudence. Its material is law as it at present exists. The history of that law is only a convenient light in which the real content and purpose of existing law may be made plainer to the analyst. The conclusions of these writers are subject to an evident limitation, therefore. Their analysis of law, being based upon existing legal systems alone and taking the fully developed law for granted, can be applied to law in the earlier stages of society only by careful modification, only by a more or less subtle and ingenious accommodation, of the meaning of its terms. Historical Jurisprudence alone, a science of law, that is constructed by means of the historical analysis of law and always squaring its conclusions with the history of society, can serve the objects of the student of politics. The processes of analytical Jurisprudence, however, having been conducted by minds of the greatest subtlety and acuteness, serve a very useful purpose in supplying a logical structure of thought touching full grown systems of law.

The State by W. Wilson, sec. 1467.—pp. 608.-609.

APPENDIX 17.

As many of the topics treated in the present work are the same as those treated in my former work, "A Systematic View of the Science of Jurisprudence," it may be serviceable to point out distinctly the difference between the purposes I have had in view in preparing the two several works. This explanation will be the simplest mode of distinguishing their nature and scope.

The former work was written especially for Law students, including under this expression all who for the time are making Law the principal part of their studies, though by no means confining the expression to those studying with a strictly professional object in view.

The present work is designed for the instruction of all serious students, whether of the Physical or of the so-called Moral Sciences, whatever be, for the time, the prominent topic of their study, and whatever be the general or special object they have in view.

Science of Law Preface—p. 1.

APPENDIX 17-A.

In order to ascertain what are the materials of the Science of Law, it will be well to cast a glance at the subject matter, in its rudest and most inartificial shape, to which the science relates. For this purpose the case may be taken of a nation in what may be called the early manhood of its life, after all the early struggles for its self-conscious existence or for its independence are over, and yet before it has developed within itself all the complicated machinery of a highly-organized commercial and social life. In such a State there must, by the very hypothesis, be a more or less steadily fixed government, whether that government approach more to a monarchical, or an aristocratical, or a democratical type. The stability of the State and its self-dependence imply agriculture, and agriculture implies property or ownership. The division of labour, again, which this economical condition presupposes, involves the habit of making contracts, even though they be of the most elementary form. The social condition cannot but rest upon a previously developed, though now strongly fortified, domestic condition, and this implies the fact of marriage, and the relations of husband and wife, parent and child, brother, sister, uncle, aunt, nephew, niece, and the like. The still remaining anarchical tendencies of certain individual members of the State, lagging behind the rest, will generate occasional acts of violence threatening, directly or indirectly, the very life and existence of the State. These acts will excite the horror of all the more orderly members of the community, and will be denominated by some such term as *crimes*.

It is obvious that the characteristic classes of facts which have just been alluded to are so general and simple that their necessary occurrence at a certain epoch in the progress of every State may be predicted as a certainly. These facts, however, in themselves are of the utmost possible moment, and involve, by their permanence and universality, the elementary ingredients of a Science of Law.

It will be seen that these facts, looked upon as a whole, imply, first, a certain number of definite relations of persons to one another, whether as governors or governed, husbands or wives, parents or children, or as otherwise allied by blood or marriage. Secondly, these facts involve certain determinate relations between the persons in the community, in respect of the things (or physical substances) appertaining to the community as a whole. These things severally are owned by one or another, and not by the rest. The ownership of these things is the subject-matter of private arrangements and contracts between different members of the community. The violent or fraudulent abstraction of a thing owned from the

owner may be one of the acts on the general prevention of which the very life of the community is held to depend, and as such is denominated a *crime*.

Again, the classes of facts already enumerated have two distinct sides to them, one touching the outward lives of members of the community, that is their *acts;* the other touching their inward lives, that is their thoughts and feelings. Over the former of these sides the whole of the community can, by its aggregate pressure, exert a considerable amount of force, of a specifically ascertained quantity and quality. Over the latter side, that touching the thoughts and feelings of individual members, the utmost direct pressure consciously exerted by the community is of the feeblest efficacy, and, at the best, indefinite and precarious in the highest degree. The sphere of action of the community with respect to the former, or the *acts* of men, is that of law. The sphere of action with respect to the latter, that is the thoughts and feelings, though not exclusive of acts, is morality. The relations of these two spheres to each other will be investigated in the next chapter.

In the mean time the following conclusions have been reached. It appears that the characteristic energy of every State consists in the reciprocal influence upon each other of the corporate whole and the constituent elements, in respect of certain definitely assignable classes of human action. These classes of action will either have reference to things or physical substances, as objects of ownership or use, or have no such reference. The actually subsisting relationship to each other of the corporate whole and the constituent personal elements depends upon the form of Government which casually happens to prevail.

Science of Law.—pp 13 to 15.

APPENDIX 17-B.

It will have been seen, in the above description of universal phenomena, that a purely abstract mode of treatment has been adopted. So far as universally confessed historical facts are pre-supposed, the truth of such facts is boldly assumed. But the main bases of the arguments are the elements of human nature itself as they are written not only in the venerable documents of ancient history, but on the face of every traveller's narrative, of every ancient body of laws, of every honoured institution subsisting in the midst of the national life of the most advanced countries of Europe. It is obvious, then, that the generality and permanence of the momentous facts above described affords the groundwork of a great science, the Science of Law.

This science is distinguishable from the Science of Ethics, to which it may be co-ordinated, as well as from the Science of Politics, to which it is subordinated. The materials of the science are : a description of (1) the essential institutions of human society, by the use of which the objects of that society are carried out through the medium of Government; (2) the nature, conditions, and limits of *law* as an expression of that side of governmental action which consists in the enumeration of general rules of action ; (3) the accidents of law, such as language and interpretation, terminology, and divices for legislation.

When these materials are carefully scrutinized, it will be found that they are composed of elements as permanent and universal as the elements of human nature itself. All that is arbitrary and idiosyncratic for any particular State is banished from the inquiry. The surplus is as applicable to one State as to another ; to the most immature system of law as to the most advanced ; to an eastern as to a western community ; to the modern as to the ancient world.

Science of Law,—pp. 18-19.

APPENDIX 17-C.

The primary object, then, which law has to keep in view, is the support of the integrity of those original groups on the continued vitality of which, as has been seen, the whole structure of the society depends. These groups are such as families, villages, towns, parishes, and the like, according to the situation or ethical peculiarities of the particular country under consideration.

The preservation and description of the Family as an integral atomic group, out of an assemblage of which groups the State is formed, is one of the most momentous of the objects on behalf of which laws exist. Even in conditions of society a long way removed, as yet, from the era of the foundation of the true State, marriage (however strangely diversified in its circumstances) is fenced about by customs as rigid and tenacious as the most mature laws. The true nature of the family group, and the amount of interference with the process of its spontaneous construction which law may properly exert, present problems which can only be satisfactorily solved by experience, and in the attempted solution of which it is likely that the most unhappy mistakes will long be persisted in. These problems are of the following sorts—first, as to the conditions and forms of marriage, and the possibility and conditions of divorce; secondly, as to the extent and comprehensiveness of the family group; thirdly, as to the amount of interference justifiable on the part of the State with the independent activity of the constituent members of the family.

First, as to the conditions and forms of Marriage, it is to be remembered that the purpose of law is not to constitute those groups, from the multiplication and organization of which the State derives its existence; but to define the limits of them, and to ascertain their relations to one another, as well as to contribute to their stability. In respect of the constitution of the State, marriage must be viewed as an *act* which determines the creation of a new family group, and from which act a number of relations, actual and possible, moral and legal, spring; relations which, taken in their aggregate, constitute marriage as a *status*. It is obvious that the determination of the moment at which a new family group takes its rise is of the utmost concern to the State; and, furthermore, the importance of keeping distinct from one another the different groups is of scarcely inferior concern. It is in view of this last object that rules for the prevention of intermarriages between blood relations and certain others, based as they often are, at first, upon curious superstitions or questionable physiological theories, are finally adopted and enforced by law.

With respect to the form of the marriage, the two main considerations must be *certainly* and *publicity*; though, even to the partial sacrifice of these considerations, it is often held expedient for law to recognize the forms of marriage already spontaneously adopted by custom. Nevertheless, the tendency in all advancing nations is to secure certainly and publicity by better guarantees than those afforded by popular practices, and thus the anomaly is often presented of two sorts of marriage ceremony co-existing in the same State,—the one reflecting and preserving the ancient usages of the people; the other, the creation of positive law as based upon carefully weighed considerations of public convenience.

The question of Divorce is perhaps the one which the conscious lawgiver encounters with the greatest reluctance, inasmuch as the arguments which carry weight with himself are peculiarly liable to misapprehension by the people generally, and are, indeed, from their nature, hard to state in a strictly theoretical form. To grant indefinite facility for divorce seems to deny the indissolubility of marriage, and to that extent to menace the integrity and permanence of every family group, thereby seriously affecting the interests of all the constituent members of the family, and so far impairing, as has been seen, the essential structure of the State itself. To grant a divorce in no case whatever, on the other hand, leads to the consequence, in numberless cases—few though they be in comparison with the remaining cases of marriage—of bringing irreparable suffering upon innocent persons, and, indeed, of favouring the growth of another set of fresh family groups wholly beyond the recognition and protection of law. To grant a certain, but not an excessive, amount of facility for divorce, again, is likely to lead to a number of frauds upon public justice, to investigations in a high degree detrimental to public manners and morals, and to the concession of a discretionary faculty to judges which, in some states of society might be fraught with the utmost danger.

Such are the problems before the legislator, in the matter of divorce, stated in their most general form. The actual aspect of those problems in any given epoch in a given country will depend upon the traditions and habits of the country, the existing standard of public morality, and the prevalent character of the judges. The solution belongs rather to the statesman than to the scientific theorist, though the latter may usefully remind the former how much of the question belongs to the region of law and how much to that of morality.

As to the rights and duties of the husband and wife in respect of each other and of the children of the marriage, one main consideration underlies all the rest; that is, the attitude of preponderance or of equality which the husband and wife shall assume in respect of one another. The matter, indeed, is closely connected with the larger one as to the legal relations of men and women throughout the community in respect of ownership, industrial and professional occupations, and

political rights. The principles upon which these legal relations in all States are or may be determined may conveniently be considered in this place.

It is admitted by reasonable disputants on both sides of the controversy with respect to the relative legal claims of men and women that, whatever may be the case in primitive times before the foundation of the true State, the whole tendency of civilization is to place man or woman, for all purposes of moral and social advantage, on an exactly equal footing. The excessive division of labour, the diffusion of education, the prevalent doctrines of personal liberty and of the dignity of the human being, as well as the vicissitudes of wealth and poverty, all tend to render impossible a condition of society in which all men have fixed and permanent advantages, physical, moral, and social, over all women. This is so transparent, that the argument in favour of different laws for men and for women, based upon any imagined inferiority of position or of moral claim on the part of women, is now nearly deserted in favour of one far more plausible and far better adapted to the actual facts of modern society.

It is said that though there is no imaginable inequality between men and women in respect either of moral dignity or of legal claim, yet the differences between men and women are so wide-reaching and radical, that all hope of assimilation of laws affecting the two must be delusive, as any attempted assimilation could only be pernicious The premises of this argument would appear to be true though not wholly in the way implied by the arguers, but the conclusion based upon them certainly does not properly follow.

To one casting an eye on the continuous history of a political society the following is the sort of panorama that would be exhibited in the matter now under consideration.

The first stage of society would exhibit women as being of little account, except for their obvious services in contributing to maintain the existence of the society, and in ministering to the physical needs of the men whose prowess in the field defends the nascent society against its assailants.

The second stage would exhibit men and women co-operating together in providing for the necessities of the whole community, the strength and prowess of the men being of little more account and little more in demand than the patience and acuteness of vision found among the women. Nevertheless, the memory of the former stage would not have faded away, while the actual and necessary peculiarity of some part of the duties and occupations of many women would tend to prop up the notion that women existed, not as integral elements of the whole society, but as subordinate ministers to the well being of men.

A third stage of society, however, presents a new scene. The idea has gained ground that the life and success of the whole community depend neither upon

an equality in its integral elements nor upon the subordination of some to the rest. This idea expresses itself in a variety of forms in the case of men. All permanent restrictions which have hampered the development of individual men are gradually abolished as anachronisms. Political rights, once the privileges of a few, become the common inheritance of all. Monopolies are discarded, and the only obstacles to general emancipation and free self-enrichment which remain are those held to be implied in the constitution of society itself, and are not the creation of theories of natural inequalities between man and man.

But the vitality of the same idea is found to extend itself to women in their relation to men. Here too there may be, and are, differences fixed by nature, and which laws can neither make nor change. On inquiry, however, it is found that laws have been made not merely to maintain these differences (for if the differences were natural and immutable they needed no such factitious support), but to aggravate and to extend them. It becomes obvious that women have suffered even more than men from the domination of monopolies, exclusive theories, and tyrannical usurpation.

The true differences between men and women are induced more marked and peculiar than those between men and men, and advantage has been taken of this to exaggerate all the evils which inequality has inflicted on men. But if the usurpation has been grosser, the social loss to the State has been greater. It is these very differences which, when properly developed, become the source of all the fine reactions and reciprocal emotions which supply the main energy of the State's life. These differences can only be expressed in their full natural strength and exuberance under conditions of perfect freedom. Any attempt to force is as vicious as an attempt to cramp; and, in fact, the one has the same result as the other.

It thus comes about that, if modern States are to proceed to the next onward stage, the differences between men and women, whatever their kind and amount, must be left to exhibit themselves spontaneously, without being fostered, and so thwarted by ignorant legislators. The same course of legislation must be pursued with respect to the abolition of legal distinctions between men and women as between men and men. This is not a question of policy, but of moral necessity, and it will sooner or later be recognized to be so.

The second class of problems which it was said lie before the legislator with respect to the maintenance of the family group, is that concerned with the extent of that group. The problem is at this day a far easier one than in past times owing to the operation of the class of facts which have just been adverted to. In England and in the United States marriage, divorce, and guardianship are the only topics with which law, as supporting the integrity of the family group, is concerned. But in ancient Rome, and to a certain extent, in the

continental countries which have based there laws on the Roman and the Canon law, the "family" appears as at small society, every member of which has his place assigned by law, and his rights and duties in respect of every other member carefully determined.

In the Roman law, again the slave, was also a member of the family group, and, in fact, the natural conception of the family, as based upon marriage and blood relationship, gave place, for a time, to a secondary conception of the family, according to which the children of the married persons ceased to belong to the family by "emancipation," and the children of other persons became members of the family by "adoption."

The history of these usages is a curious illustration of the dominion that legal conceptions can obtain over even the most fixed and powerful of all associations of thought; while the gradual decline of them, first under the jurisdiction of the prætors, and then, under the legislation of the emperors, points out how enduring is the conception of the natural family, as the integral group out of which the State grows, even in the face of the dominant conceptions of law. The "Patria Potestas" in Roman law, surviving to some extent on the continent at this day, affords a striking instance of the energy with which the main forces of the State may be converted to doing no more than support the harmony and integrity of the family group.

The third class of problems before the lawgiver, in reference to the bearing of law upon the maintenance of the elementary groups of which the State, as an entirely, consists, concerns the permissible amount of political interference with the individual persons composing the several groups. It is only in very primitive society that the head of the family, as representing every member of it, is the only person known to the law, whether as owner, or contractor, or as solely responsible for the wrongful acts of those under his control.

Amos—Science of Law,—pp. 123 to 130.

APPENDIX 17-D.

The peculiar dangers to which the institution of these so called "endowments" is exposed are of the following kind. In the first place, though the main objects on behalf of which the wealth of one generation may be beneficially applied to the use of future generations, may be easily described under the general heading of unavoidable accident, remediable or even irremediable disease—bodily or mental—and education; yet, even within such general terms, there is large room left for the play of mere eccentric disposition. To confine strictly the class of permissible endowments within any language capable of being comprised in the terms of a law would seem to be almost impossible.

Some writers have urged the political expediency of allowing the largest conceivable to settlers and testators in the matter of the objects to which they wish their accumulated wealth to be devoted, provided that at some future time, however distant, the wealth either lapse refresh into the treasury of the State, or be diverted to objects approved as beneficial by the supreme political authority of the day. The question is wholly one of comparative expediency, and the answer to it for any particular country must depend upon the motives which in that country seem to be the most favourable to the accumulation of wealth, when considered in the light of the necessary inconvenience flowing from the arrest of the circulation in land and money, which is the necessary result of endowments. It is probable that a security that their funds will be wisely employed, in all future time, in accordance with the demands of that time, will stimulate to make gifts to charitable objects quite as many persons as will be deterred by a knowledge that their own design may hereafter be reconstructed.

Secondly, another difficulty is experienced in regulating endowments by law on the ground that while, at every moment, the administration of the funds must be regulated by definite persons, the nomination of these persons is a matter demanding a peculiar degree of discretion, and their constant supervision equally calls for the most unresting vigilance.

In the case of the innumerable endowments which the superstition or well-meant eccentricity of past ages have handed on as perplexing heir looms to succeeding ages, the making and regulating nominations to trusteeships with the requisite amount of circumspection, and the control of the conduct of

trustees, in every case involves an omnipresence and omniscience on the part of the administrators of law which clearly cannot be looked for. The mode in which this sort of difficulty is encountered in England is by the appointment of temporary or even permanent commissions, with power to investigate the circumstances of certain classes of endowed charities; and either simply to report upon the manner in which the funds are administered with a view to legislative reform, or to take the management of them to some extent into their own hands, with such aid from the legislature as they may from time to time receive or require.

But such devices are very desultory in their operation, and even the most inquisitorial of commissions seldom succeed in touching more than the more important and conspicuous classes of endowments; while, even as to these, the remedy afforded is, without incessant aid from the legislature, only momentory, if not wholly inefficacious. The only true remedy for the difficulties experienced by law in the process of making endowments subserve the general interests of the State, and not conflict with those interests, is to ascertain clearly the true principles upon which alone the privilege of diverting for ever the general wealth of the community to special ends dictated by the caprice or even passion of private persons can be permitted; and then to provide fearlessly for the gradual suppression or reform of all existing endowments not in conformity with these principles.

Much difference of opinion, indeed, may exist as to the exact nature of these principles, as with respect to the expediency of admitting an indefinite latitude to the fancy or the seemingly irrational prejudices of Donors; or of importing into the mode of applying them variations which reproduce in no sense the original conception of those donors. But no difference of opinion can exist as to the inexpediency of letting the funds be wasted or applied to objects which universal experience has condemned as pernicious and destructive to the State; and even still less can exist as to the vigilance that must be exerted to provide against the fraid and incompetence of those in whose hands the funds may from time to time be vested.

Amos—Sicence of Law—pp 138 to 140.

APPENDIX 17-E.

The purpose of the Law of Contract is to impart stability and security to certain temporary relationships with one another which men spontaneously frame for themselves. The relationship between two contractors differs from the relationship of family life in the spontaneity which originates it, and in the freedom which the parties enjoy for the purpose either of describing and modifying its terms or of annulling it altogether. Thus the essential quality of the relationship implied in Contract is freedom in respect of its original creation ; in respect of the description of its nature and of its terms ; and in respect of the mode and period of its conclusion The real policy which dictates a law of contract is that of giving the same reality and consistency to the groups which evolve themselves through the play of social and economic life as primitive law gives, in the manner already described, to those groups, of which the gradual formation is the indispensable condition precedent to the very existence of national life.

Amos—Science of Law—p. 190.

APPENDIX 17-F.

There are, indeed, two distinct aspects in which the relation of principal and agent figures in the law of contract. There is first the contract of agency, which is nearly the same as the Roman *mandatum*, the object of which is to enable one person to repose confidence in the management of his affairs by another. In the ordinary business of life, and still more in the conduct of complicated commercial concerns, especially such as have offshoots in other countries, the convenience and necessity of such personal representation are sufficiently obvious. Like other contracts, this one may either be created by express language, written or spoken, or may have to be presumed from the acts of the parties (such as ratification of acts previously done) and from surrounding circumstances. In some cases the importance of guarding against abuses of frauds in this sort of substitution of persons is so great that law demands compliance with special forms in nominating an agent for certain purposes, as for appointing a *procurator* or *cognitor* at Rome and granting a "power of attorney" in England.

The other aspect in which Agency appears in contract law arises out of the previous one, and relates to the capacity and power of an agent, when duly appointed, to make contracts on behalf of his principal. This belongs to the more general question as to the number and kind of legal purposes for which representation (*per nuntium* in Roman law) is admissible and what are the legal consequences to all the parties, conceivably interested, of such representation. The making of contracts is always held to be one of the purposes to which representation can extend. In this way the fact of agency first gives rise to a contract of agency between the principal and the agent; and, secondly, if the purpose of the agency is that of making contracts on behalf of the principal, that fact may qualify the liabilities arising under the contract presumedly made between the principal and third persons.

Perhaps the most remarkable of all applications of contract to diminishs the uncertainty due to the precariousness of human life and to the prevalent liability to accidents of all sorts, by which calculation is baffled and order of general existence disturbed, is the invention of contracts of Assurance. These, in modern society, take a large number of forms, according as the chances of death, fire, shipwreck, storms or other disasters, not to be foreseen yet not wholly to be avoided, seem to call for them.

There is, in truth, something of a gambling or speculative element in this class of contracts, as the insurer foresees only an indefinite liability to certain classes of accidents. He may be fortunate enough to escape altogether, or he may be unfortunate enough to meet with more accidents than one, or with more calamitous accidents than the average. A vast number of other insurers are in the same position. The object of the contract is to provide a machinery for making such joint and regular contributions that a fund may be available to compensate any one upon whom an occasional disaster, of the kind insured against, may fall.

Thus far all that is speculative in the matter is so only to the trifling extent that each contributor pays in proportion to what he takes to be the value of his chance of needing to resort to the joint fund for reparation of loss. But the form these contracts take is not usually that of a contract between the insurers alone. These persons are generally too numerous, too scattered, and too isolated to be able to dispense with a mediator in the character of a person, or company of persons, whose function it is to negociate the transaction; and, in the course of doing so, to remunerate themselves for their trouble and risk by securing that, at all events, more money shall be paid into the fund by contributors than is paid out to repair losses.

It is the "assurance-company" which contracts with each of the insurers: and the terms at which the periodical payments or "premium" are adjusted are always fixed on such a scale that the company must in no case lose; must, if the losses equal the average, gain; and may, if the losses be less than the average, gain largely. This is really a "gaming" contract, that is one which, like a lottery, ensures certain gain to some of the parties to it, and certain, though indefinite, loss to others. Such contracts are generally discouraged by the policy of the most advanced modern States, as tending to keep up a feverish spirit of gambling and to make the ignorant and poor the principal victims. The obvious advantage of assurance contracts and the spirit of general providence they tend to cultivate at once lift them out of the field of all such criticism.

Amos—Science of Law.—pp. 224 to 227.

APPENDIX 17-G.

Assuring, then, that the prisoner is brought to trial in due course of law, the next question that presents itself is as to the mode of trial which is conducive in the highest degree to the vindication of innocence and the exposure of guilt. At this point one great institution which has prevailed most extensively in England, though it is now being copied by many of the European States, that of trial by jury, as applied in criminal procedure, claims attention.

The institution of trial by jury and the reason of its universal popularity would seem to have a close connection with what has already been pointed out as the moral element which is so conspicuous in the analysis of the most common legal crimes. The estimation of this moral element is somehow felt to be more satisfactory entrusted to a body of ordinary persons without any predisposition to adopt artificial distinctions, and without any technical training, then to a judge whose professional habits of thought might induce him to leave out of account some of the rougher elements of moral judgment which are the basis of action in common life. Furthermore, there is no doubt a scarcely conscious sentiment that the solemn act of awarding punishment demands the acquiescence of a representative body of the people as a whole ; and that the jury, however casually chosen, forms such a representative body.

These explanations of the popular attachment to jurytrial are wholly independent of the more obvious reasons for introducing and adhering to it as the best possible corrective to such influences as, even in the best organized systems of administration, the executive may still contrive to exert over the judicial bench. The questions as to the number of persons required to constitute a jury and as to the number of the jurymen required to assent to a verdict, are questions rather of calculable convenience than of political principle. A larger number, however, may well be required to constitute a jury for trying the heavier crimes; and, instead of requiring unanimity, the consent of some large number, short of

all, would seem rather expedient in order to provide against the occasional presence of excessive prejudice, ignorance, or irrationality.

The fact already noticed that trial by jury supplies a popular and not unsuitable mode of estimating the moral element that enters into criminality also discloses the source of a serious difficulty which attends that form of trial. In any case that presents itself, the complete judicial investigation resolves itself into two parts which are always quite distinct from one another, though they may be blended in procedure; or, from its comparatively insignificant importance in any given case, one part may occasionally seem lost in the other.

Amos—Science of Law—pp. 266 to 268.

APPENDIX 17-H.

If a criminal law is wisely constructed, and based upon the needs of the whole community, and not upon the arbitrary and tyrannical prejudices of a class, general obedience to that law is the first and highest requisite of political existence. Want of general obedience implies approaching social dissolution. Universal disobedience implies that the State no longer exists. Thus the question of the reformation of any number of individual offenders is out of all proportion insignificant as compared with that of securing general obedience to law. The two cannot even be put in scales over against one another. They are incommensurable quantities.

Assuming then, that the first object to be kept in view is that of securing general obedience to law, it remains to be seen how punishments can best be chosen and measured in order to achieve this end, it not being forgotten that, in selecting between two kinds or degrees of punishment, equally efficacious otherwise, that is to be preferred which is least incompatible with the moral reformation of the culprit.

Criminal punishments may operate in the prevention of crimes in three distinct ways. Some punishments, as those of death, transportation, and imprisonment, by removing the offender temporarily or permanently from the midst of the society, to that extent forcibly prevent him from repeating his crime. The mutilation of those members which have been the instrument of committing crimes had a like effect, when such punishments were in use.

All punishments, again, quite apart from their actual quality or degree of severity, serve to mark in a distinct and public way the triumph of society over the devices or mischievous violence of a recalcitrant citizen. The actual infliction of the punishment re-establishes, as it were, the violated order. It reasserts in emphatic terms outraged authority. It proves decisively the

weakness and purility of guilt when brought into conflict with the mighty force, moral and physical, of the whole State. It is to be noticed that the success of this sort of operation must wholly depend upon the certainty of convictions and the rarity of misadventures in the administration of justice.

It happens, however, fortunately for mankind, that the lighter the punishment the more infallible is the process of convicting the guilt and of liberating the innocent. When the punishments are severe, or any attempt is made to assimilate, by a spurious and most misleading form of calculation, the suffering they cause with the hypothetical suffering resulting from the crime, convictions become proportionately irregular and uncertain. The attention of the tribunal (especially when it is a popular one) is unconsciously diverted from the consideration of evidence—a subject quite enough to occupy the whole mind—and is directed to the penal consequences of an adverse decision. Thus, in cases where the punishment is either very severe, or, under the circumstances of the particular case, wholly disproportioned to the moral guilt, and yet is inflexibly fixed, every shred of favourable testimony is laid hold of with the utmost possible zeal, and the prisoner is acquitted, not because it is believed he is innocent, but because it is too painful to encounter in thought the possibility of his punishment. Such an extreme crisis is not of course of very frequent occurrence; but so far as punishments are vindictive in their aspect, harsh in their quality, and admitting of no discretionary graduation by the judge, to that extent verdicts are likely to be determined at least as much by the promptings of sympathy as by the weight of evidence.

It may be looked for, at no distant day, that the whole vindictive theory of punishments, and the use of harsh and cruel punishments, shall have wholly vanished from the criminal code of every civilized State. It is a change which, no doubt, cannot be introduced all at once, but must be gradually approximated to. The increasingly numerous and humane advocates of reformatory movements will contribute much in this direction, though too often with an imperfect apprehension of all the ends in view.

The third mode in which criminal punishments operate is the coarsest and least worthly one, as appealing to the lowest and most cowardly feelings of man's

nature. It is that mode, however, which seems to many superficial legislators, the only one worthy to be taken into account. The mode is that of inflicting the exact amount of physical suffering which it is believed is sufficient to counterpoise the pleasure sought by the commission of the crime. Any such affected balance of a good and an evil must be extremely delusive; first, because any one contemplating the commission of a crime unconsciously takes into account not only the actual punishment, but also the certainty of the punishment following the crime, and the date at which, if at all, it will follow; secondly, the moment of temptation to commit a crime is seldom, and least of all in the case of the worst educated people, the moment of the most discreet calculation.

Amos—Science of Law—pp. 280 to 283.

APPENDIX 17-I.

The subject of "costs," that is, of who is to pay the expenses of the trial, is one of far greater magnitude and moment than perhaps, at the first glance, it seems. The interests of three parties have to be considered—those of the plaintiff, of the defendant, and of the State. It has been said by some, with much force, that all the expenses of every trial should be borne by the State alone, because it may be imputed to the shortcomings of the State that the law is so uncertain as to admit of any doubt as to its meaning; and even where litigation is concerned with the settlement of disputed facts, the State, in conceding a right, is bound to supply freely the means of protecting the right, and is not entitled to throw its own burden upon either of the contending parties, whichever happens to be in the wrong.

On the other hand, it is urged that the only possible mode of prohibiting incessant litigation of the most needless and vexations sort, is to make the party who is proved to be in the wrong bear some of the expenses which the State incurs in setting its judicial machinery in motion. It may also be said that the necessity of contributing to these expenses, in case of defeat, is at once a check upon wrong-doing and an encouragement to amicable arrangement of controverted claims.

The true objection, however, to this practice of throwing the expenses, or part of them, on one or other of the suitors, is that it makes it far easier and safer for a rich man to go to law than for a poor man. It thus operates directly as an encouragement to the rich to prey upon the poor. The institution of the English County Courts where the costs are small, and the constant extension of their jurisdiction, have been most important steps in the opposite direction in England. It is probable that a greater simplification of procedure in the Superior Courts, accompanied by a re-publication of the whole law on a readily comprehended basis

of arrangement, and with the use of the utmost clearness of expression, would (even if costs were no longer payable by either party) go a long way towards bringing before those courts questions which are now improperly and tyrannically excluded, and towards largely reducing the number of those which are now needlessly admitted.

Amos—Science of Law—pp. 316-317.

APPENDIX 17-J.

A law of ownership has, for its immediate object, to ascertain the relations of persons towards each other in respect of the possession or use of things. The possession or use is, in itself, a mere physical fact. The effect of a law of ownership is to bring this possession or use under the control, as it were, of social reason ; to determine under what conditions it shall or shall not be protected ; to name the things in respect of which possession shall be recognized at all ; to define the limits of time and space over which the possession shall be allowed to extend ; and to ascertain the persons who, in respect of any given thing, at any given time, shall be entitled to the possession or use of it. When once the rightful possessor is, in respect of a given thing, at a given time, ascertained, he has vested in him legal rights against all other persons whatsoever. The extent of these rights may be small and limited, or be large and indefinite ; and this, both in respect of the time during which the rights have to last, and of the variety of the uses to which the thing possessed may be turned. So, again, there may be a multitude of ways which the law may select for denoting that these rights have become vested in a particular person, and the law may interfere to a greater or less extent with the freedom of individual choice in recognizing a right of ownership as vesting in one person rather than in another.

Thus the elements in a completely developed law of ownership may be arranged in some such way as the following :—First (1) of all, the *things* as to which ownership is possible have to be determined. Secondly (2), the quality and extent of the *rights* recognized by law have to be precisely described. Thirdly (3), the *modes* in which those rights become vested have to be described and enumerated. These are the main essential parts of every law of ownership.

Amos—Science of Law—pp. 159-160.

APPENDIX 17-K.

The Science of Jurisprudence may be said, broadly, to deal with the necessary and formal facts expressed in the very structure of civil society, as that structure is modified and controlled by the facts of civil Government and of the constitution of human nature and the physical universe. This attempted description needs some expansion. To allege that jurisprudence is a Science is to say that it is concerned with certain sequences of facts which, within the limits of recorded experience, are invariably the same for all times and places. As, however, the sequences of facts in question are those due to the existence of Law—that is, of a body of commands formally published by a Sovereign Political authority—the times and places in which those facts are found must be such as admit of the presence of Law. In other words, the Science of Jurisprudence deals with certain sequences of facts invariably present at all times and in all countries not absolutely barbarous or without any kind of Government.

Now the existence of any kind of Government, even of the most inartificial and primitive, involves the presence of Law just as much as Law involves that of Government. Law and Government are born together, grow together, and die together. Furthermore, the presence of Law implies the opposition to each other of two different sets of persons in the community. There are, first, those who devise and impose the law; there are, secondly, those to whom the law is addressed and whom the first set of persons punish in the event of the law being disobeyed. Now the relations of these two sets of persons to each other admit of infinite diversity, and, in fact, may travel through the whole scale of State Constitutions which have existed or may exist on the face of the earth. But when once this relation of lawgivers and law-receivers is created, and whatever be its nature, there are some sequences which are permanent and invariable.

For example, every law contemplates the possibility of an act of disobedience to it, and every act of alleged disobedience to a law entails certain inevitable consequences. These consequences, implied as they are in the very meaning of the terms Law and Government, as interpreted with reference to the actual condition of the human beings for whose use they are provided, may be arranged as follows:—

(1.) Allegation by the Lawgiver, or his deputies the executive, that the act complained of is an act specially forbidden by the Law, or that it falls under the class of acts generally forbidden by the Law. This involves *Interpretation* of the Law, with all the attendant

distinctions as to the so-called *Sources* of Law, whether written or unwritten, and the production of the requisite *evidence* as to the nature of the act.

(2.) Allegation of moral responsibility in the offender, that is, the assertion of his having known or having had imputed knowledge of the existence of the Law said to have been disobeyed, of his having contemplated both the performance of the whole act and its immediate consequences when he moved his muscles in such a way as to bring it about, and of his having had the physical power so to move his muscles or to abstain from moving them; all this is gathered up in the allegation of *Intentional* breach of the Law.

(3.) Adjudication, more or less formal.

(4.) Punishment in default of pardon at the hands of the Lawgiver, or the making of a fresh Law productive of a like result.

A Systematic View of the Science of Jurisprudence,—pp. 1–3.

APPENDIX 17-L.

Thus the fact of a Law of Ownership peremptorily involves the distinct contemplation of the following series of facts :—

(1.) Persons who own.

(2.) Things owned.

(3.) Events upon the happening of which the fact of ownership commences or determines. (Title.)

(4.) Qualification of fact of ownership as to time of commencement and mode of exercise.

(5) Exercise of ownership, with or without actually recognised claim in the person so exercising it.

(POSSESSION.)

Each of these leading kinds of distinguishable matter in the whole body of the Law of Ownership involves still finer distinctions, which are quite as necessary and universal as the broader and larger ones. Thus—to take not more than one instance:—

The things to be owned may be either—

Movable or immovable.

Perishable or imperishable.

Destructible or indestructible through use.

Divisible or indivisible.

Enjoyable at the same time only by one person, or by more than one person, or by all persons equally or otherwise.

It is the noting and classifying of such distinctions as these, treated as essential sequences of fact following upon the more general fact of the mere existence of a Law of Ownership, and wholly independent of the particular regulations of which the whole body of that law may be accidentally compounded, that constitutes the Science of Jurisprudence.

A Systematic View of the Science of Jurisprudence.—pp. 5-6.

APPENDIX 17-M.

The Science of Jurisprudence has for its purport the noting and classifying of all the sequences of fact brought about by the contact of the fact of Law with all the other facts of human life, carried on as that life is in the midst of the actual and indestructible conditions of the physical world. It has thus been seen that, however rudely and imperfectly constructed a legal system in any community may chance to be, none the less does the operation of that system supply copious materials for the cognisance of the Jurist. The simplest form of Government, and the roughest principles of ownership, afford a number of invariable sequences calling for exact description and arrangement. But, as moral sentiments improve, and intercourse between man and man for industrial and social purposes becomes more frequent and complex, new kinds of law are constantly demanded, and, however tardily it may be in proportion to the urgency of the demand, are gradually supplied. Thereby new sequences, due to the contact of these new laws with the permanent or the more transient facts of human life, are again brought to light, and the Science of Jurisprudence is constantly receiving a proportionate extension and enrichment. A Law of Entail, for instance, at once brings into view the persons made capable by Law of creating the entail of the persons made capable of benefiting by it, and of the land or other things with respect to which the capacity given by Law may be exercised. Further limitations appear on the horizon as to the length of time during which the entail may continue, as to the modes by which the period of its natural efflux may be restricted or extended, and of the casual events upon the happening of which its enduring validity may be made to depend.

A Law of Bankruptcy is a further instance of the mode in which the facts with which the Science of Jurisprudence deals become multiplied as civilisation progresses. A law of this nature implies—(1) A distinction of "acts of bankruptcy" from all other acts; (2.) A designation of what shall be the formal modes of making a claim to participate in the assets, and what the principles of distributing the assets among the rival claimants; and (3.) What shall be the rights and duties of the bankrupt after his discharge.

So, again, a Law of Divorce, when such a law comes to be enacted, involves a precise description of the acts or events which shall entitle the husband or wife to claim a divorce, and also an enunciation of the legal rights and duties of the divorced persons in respect of property owned or to be owned at any time by either of them, and in respect of the nurture and education of and provision for the children of the marriage. These cursory illustrations have been selected almost at random to make more unmistakably clear the truth that Jurisprudence is a growing Science, in the sense that the facts with which it deals are constantly accumulating as a more complicated social condition is being brought about.

A Systematic View of the Science of Jurisprudence—pp. 9-10.

APPENDIX 71-N.

DEFINITION:—*The Science of Jurisprudence deals with the facts brought to light through the operation upon the fact of Law (considered as such, and neither as good nor bad) of all other facts whatsoever, including among these other facts the facts resulting in the creation, and expressing the historical and logical vicissitudes of law itself.*

It is quite impossible to contemplate Law as an isolated social phenomenon, standing alone among an indefinite number of other social phenomena. In no conceivable condition of mankind could it ever have stood alone. It is peculiarly the product of every social force existing at any moment in the community; it reacts back upon the social forces as being in itself the most potent force of all. Before a law attains its end through the processes of administration and interpretation it is directly qualified by every strong wave, and by all the multitudinous weaker waves, of thought and feeling by which, for the time, the community is swayed. The work of the jurist is the evaluation and classification of these influences, so far as they react upon the pure fact of Law: it is not for him to say what are the degree and mode of their operation at any particular epoch or in any particular country, nor how some kinds of Law are practically affected more than others. Such investigations are relegated to the historian, the statistician, the traveller, or the moral philosopher. The jurist supplies each of these with the instruments for their investigations. He assists them in clearing the field from all irrelevant matter; he warns them against confusing the influence of what is partial and transitory with what is universal and everlasting; he teaches them how to lay hold, in Law itself, upon all that is essential to its very nature, and to suspend for a time all moral and political judgments with respect to its justice, its expediency, or its capacity of attaining its ends.

A Systematic View of the Science of Jurisprudence—pp. 18-19.

APPENDIX 17-0.

From the above analysis it would appear that all the phenomena of Law, as they present themselves in a national society, may be distributed under three main heads, including severally :—

(1.) All the historical vicissitudes attending the formal communication of the will of the person or persons imposing the Law.

[Under this head will be treated such matters as the history of the Growth of Law, the nature of its Sources, actual and possible modes of Legislation, the need and the modes of Interpretation, so far as the facts implied in the mention of any of these topics react upon the quality and operation of Law itself.]

(2.) An enumeration of the essential contents of any single law viewed as a command proceeding from a competent authority and purporting to control the acts of persons in the community.

[Under this head a precise meaning is attached to such terms as "person," "acts," "commands," "control" and "political community." It is noted that variations in the meanings of these terms are brought about in two ways : first, by a change, due to national development, in the facts denoted by them, to a general recognition of which change a public appeal is made ; secondly, by an arbitrary extention or restriction effected in the technical use of the term for merely logical purposes. Both these kinds of variations have a like effect on the operation of Law at the moment at which, in the course of actually administering it, the question arises whether an alleged command is or is not a true law.]

(3.) The logical arrangement or classification of all the particular and accidental materials of which all possible systems of Law are composed.

[It has already been seen in what ways, among others, such a classification can be attempted. The founders of each System of Law, and each scientific jurist, have hitherto contemplated a different arrangement. It has been suggested above that the most convenient mode to adopt is the one which serves the double purpose of starting directly from the complete definiton of Law, and of keeping constantly in view the social purpose which

all law making, whether spontaneous or systematic, is intended to subserve. The immediate end of every law is to control the *acts* of *persons*; hence no simpler or more natural mode of distributing the materials of all possible legal systems can be arrived at than that of investigating the distinctive character of all the *acts* falling under the possible control of the legislator. These *acts*—it has been seen—have generally a more direct bearing on some *person* or *persons* affected by them, than on others. Furthermore, they affect the *person* who is the immediate object of them either with or without the interposition of a *thing* or detached portion of the material world. Hence the quality of the *persons* directly affected affords one basis of classification and the fact of the interposition or non-interposition of a *thing* between the agent and the person directly affected by the act affords another.]

A Systematic View of the Science of Jurisprudence pp. 27 to 29.

APPENDIX 17-P.

The Science of Jurisprudence has for its purpose the investigation of all the possible modes in which the operation of Law is qualified by the existence of all the other facts which belong to the material or the moral universe. This general description of the territory occupied by the present Science was assumed in the last chapter with the view of enforcing the plenary recognition of all those facts before attempting to ascertain in detail their bearing upon the fact of Law. It was also desirable to warn the juridical student that the fact of Law is so intimately interwoven in the way of cause and effect with the most apparently alien regions of human life and interest, that nothing can save him from endless embarrassments and practical errors but a clear mapping out, at the very threshold of the enquiry, of the provinces of the several Sciences which border on the Science of Jurisprudence. It is not, indeed, all the facts comprehended in Physical, Psychological, Ethical, and Political science that bear upon the fact of Law, or, at least, that can be obviously and immediately shown to do so. But the facts of those Sciences which do so bear upon the fact of Law cannot be understood, or separated from that upon which they operate, without a mastery of the facts as forming parts of organic wholes.

The purpose of the present chapter is to look at the Science of Jurisprudence on the inside, as it were, rather than on the outside; to see of what facts it takes cognisance, rather than to expel and keep at a distance those which do not concern it, of course in doing the first part of the work,—that of pointing out how far all other Sciences are distinguishable from that of Jurisprudence,—the second part, treating of the facts which alone are relevant to that Science, has been implicitly involved. However, by way of introduction to the detailed analysis which will form the bulk of this treatise, what has been hitherto suggested only implicitly must now be described with all possible explicitness.

There are two broad and universal aspects in which the fact of Law presents itself. There is, first, its historical generation as a political or ethical phenomenon, so far as Law has grown up in the midst of a people as the formal expression of the immutable order which invariably characterises a National Society in every one of its stages. There are, again, its formal modifications, whether as exhibited in the degrees of facility with which it attains its practical purpose, or in the several and different kinds of subject-matter with which it, from time to time, affects to deal.

The actual System of Law, then, in any National Society whatever, must needs surrender itself to an analysis attempting to distinguish these different features. In each such Society the fact of Law has originated in and through a distinct process of generation admitting of being brought to the light of day by historical, logical, psychological, or purely physical methods of investigation. In each such society, again, and at any given epoch, the system of Positive Law then and there existing admits of more or less exact and elaborate distribution into compartments in view of the various purposes the system has to serve, that is, according to the various kinds of acts it affects to control. The system, moreover, effects those purposes with different degrees of precision according to the special modes in which it happens to be published to the people, and to the logical instrumentality ready to the hands of those whose function it is to interpret and administer the system.

Applying, then, this analytical process to any particular system of Law at any particular epoch, the results will fall under the following heads :—

(1.) General account of the historical and logical genesis of the fact of Law as appearing in the midst of the National Society in question.

(2.) A classified exhibition of all the actual laws composing the system ; such classification being instituted either on the basis of the varying nature of the acts the laws affect to control, or upon some other basis.

(3.) An enumeration of the several material modes through which the whole System of Law is published to the people, and of the logical provisions actually in use for the purpose of securing an accurate Interpretation of the Law.

Now it is by lifting this process out of its narrow and partial application to a particular System of Law at a particular epoch into its universal application to all Systems of Law whatsoever at all epochs that the work of the Jurist consists. It is by a process of rigid induction, founded on the particular examination of a variety of Legal Systems, as well as on the premises supplied by a number of related Sciences, that the jurist finally obtains his great skeleton grammar of Law into which the flesh, blood, arteries, veins, and nerves of every fresh System of Law must necessarily adapt themselves. He will so have ready to his hand an universal standard by which to test the formal and material completeness, the efficiency and the "elegancy," of every System of Law which happens to come under his notice ; and, furthermore, to pave the way for that closer approximation, in form at least, between the Legal Systems of different nations on which a more frequent social and commercial intercourse, as well as a greater intimacy in public relations between those nations, hangs suspended.

The critical stage, then, in the construction of a Science of Jurisprudence is that of generalisation from the particular results obtained as above. Out of all the results which are presented by an indefinite number of particular systems and of particular epochs, those results have to be selected which are equally true for all systems and for all epochs. Thus the results selected will be more multifarious than those given by the examination of any one system by itself, but far less so and far simpler than the aggregate amount of the results obtainable by the examination of a number of systems in succession. The process of generalisation is especially simplified by a method similar to that in use in philological studies; that of evaluating separately the essentially fixed elements and the principles of variation in the number and nature of those elements. In this way the whole process by which the materials of the Science of Jurisprudence are finally brought into view may be regarded as of a two-fold nature, that is, at once *statical* and *dynamical*. The *statical* view determines what are the permanent and universal elements distributed as above, which characterise the fact on Law, wherever existing and at whatever time. The *dynamical* view determines the nature, direction, and rate of change introduced into those elements, both through the mere passage of time and through an enlargement of the purely National conception in respect of space.

Thus, on the completion both of the *statical* and the *dynamical* process, a true and finished system of jurisprudence might distributed be into the following departments:--

I. A description of the original fact of Law in itself, an account of the historical and logical genesis of that fact, and an explanation of all the leading terms essentially involved in the meaning of the term "Law."

II. An investigation of all the possible *Sources* of Law (or immediate modes by which actual laws are or may be created), and of the process of *Interpretation* as severally modifying the operation and nature of Law.

III. A classificatory arrangement of the contents of all possible systems of Positive Law, whether on the basis of—(1) the social purposes Law is destined to serve; or (2) the particular benefits to private persons it affects to communicate; or (3) the acts of private persons it affects to control; or upon some other basis. These several bases, namely, that according to the political object of laws, that according to Rights, and that according to Duties, may be combined in the same systems of arrangement, one leading the way, and the remaining two subordinating themselves to the dominant one.

IV. An investigation of theories of variation in the quality, number, and mutual relations of all the above elements,- whether such variation operates in time or in space.

A Systematic View of the Science of Jurisprudence—pp. 40 to 44.

APPENDIX 17-Q.

At the commencement of this Treatise an almost excessive amount of care was taken to fix with precision the true import of the phrase "Science of Jurisprudence." It was shown at once that such a Science Exists and what its contents are. It may be serviceable in this place, indirect relation to the wants and difficulties of the Legal Student, to criticise the extremely loose way in which the Term "Jurisprudence" is commonly employed.

The Term "Jurisprudence," in the present State of English Scientific Terminology, suggests, even to the Professional Lawyers, ideas possessing every degree of laxity and indeterminateness. To some the Term "Jurisprudence" conveys no more precise meaning than what may be described as "everything that has to do with the Law of a Nation, or 'perhaps' any other, if there be any other, kind of Law." To others, the Term means the "Philosophy" of Positive Law; an expression consecrated indeed by Mr. Austin, but which throws enquirer back on the true import of the Term "Philosophy," and so into one of the most intricate and hopeless questions of Nomenclature that has ever divided the world of Thinkers into an indefinite number of mutually repulsive atoms. To others, again, the Term "Jurisprudence" means nothing more than the process of comparing at leisure the Positive Law of different Countries without having any distinct purpose in instituting the comparison. Or, again, the Term seems to be almost synonymous with "Legislation," and to mean the process of discovering the best Laws to Make, and also the best way of Publishing them in Formal Language so as to secure them most effectually against all chances of erroneous Interpretation. Lastly, the Term "Jurisprudence" means, for many serious minds, the intellectual process of ascertaining the Place that the Phenomenon of Law holds in the constitution of Human Society and in the Development of the Human Race. In this use of the Term the History of Law, Ancient and Modern, the Facts attending the Growth of International Law, the Usages of Barbarians, and the recorded aspirations of Utopists, are held to be the legitimate or the only appropriate matters of interest for the Professional Jurist. The most consistently employed meaning of all is that which is scarcely known in England, though familiar enough to a French ear, according to which it implies the finer shades of Interpretation of a well-acknowledged Rule of Law which are gradually developed in the course of the actual Administration of Law in Courts of Justice.

Such being the flux and plasticity of the luckless Term "Jurisprudence," it cannot be surprising if the young English Student approaches the Science of Jurisprudence with somewhat of a quivering heart and trembling gait. He knows not where he is going and is not quite sure whether he is going, or wanting

to go, any where. He thirsts for something broader, deeper, more indestructible than anything he can find in Tex-books of English Law or in the successive modifications in the substance of Law itself. He hears of "Jurisprudence" and he has a dim hope that what he is in search of may perchance be there. He draws near, and in the place of a science, or a systematic exhibition of what is universal and everlasting, he is often enough regaled with nothing more satisfying than the story of incessant Change, the dreary register of meaningless variety, the loose guesses of Politician and Moralists, the reckless verbiage of those who have studied just Law enough to confuse the spontaneous workings of their Conscience, and yet who affect just sensitiveness enough of Conscience to interfere with their unflinching Interpretation of a single Law.

It is sufficient here, in relation to this prevalent confusion of Thought or variety of Expression, to recur to the definition or Explanation of the Science of Jurisprudence given in the first Chapter of this Work, and which has been consistently adhered to throughout. "The Science of Jurisprudence deals with the facts brought to light through the operation upon the Facts of Law (considered as such, and neither as good nor bad) of all other facts whatsoever—including among these other facts those resulting in the creation and expressing the Historical and Logical vicissitudes of Law itself."

A Systematic View of the Science of Jurisprudence—pp. 507 to 509.

INDEX.

R

S

T

U

V

W